DOCKET

No. 08-9156 *** CAPITAL CASE ***

Title: Holly Wood, Petitioner

v.

Richard F. Allen, Commissioner, Alabama Department of Corrections, et al.

Docketed: March 12, 2009

Lower Ct: United States Court of Appeals for the Eleventh Circuit

Case Nos.: (06-16412)

Decision Date: September 16, 2008

Rehearing Denied: November 12, 2008

Questions Presented

Date	Proceedings and Orders
Jan 21 2009	Application (08A642) to extend the time to file a petition for a writ of certiorari from February 10, 2009 to March 12, 2009, submitted to Justice Thomas.
Jan 28 2009	Application (08A642) granted by Justice Thomas extending the time to file until March 12, 2009.
Mar 12 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 13, 2009)
Apr 13 2009	Brief of respondents Richard F. Allen, Commissioner, Alabama Department of Corrections, et al. in opposition filed.
Apr 23 2009	Reply of petitioner Holly Wood filed.
Apr 29 2009	DISTRIBUTED for Conference of May 14, 2009.
May 18 2009	Motion to proceed in forma pauperis is GRANTED. The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.
May 27 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including August 3, 2009.
May 27 2009	The time within which to file respondents' brief on the merits is extended to and including September 18, 2009.
Jul 29 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 29 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents.
Aug 3 2009	Joint appendix filed (two volumes). Statement of costs received.
Aug 3 2009	Brief of petitioner Holly Wood filed.
Aug 6 2009	Brief amici curiae of American Civil Liberties Union, et al. filed.
Aug 10 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Aug 17 2009	SET FOR ARGUMENT ON Wednesday, November 4, 2009
Aug 17 2009	CIRCULATED.
Sep 18 2009	Brief of respondents Richard F. Allen, Commissioner, Alabama Department of Corrections, et al. filed. (Distributed)
Sep 25 2009	Brief amici curiae of Indiana and 18 additional states filed. (Distributed)
Sep 25 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Oct 8 2009	Record received from U.S.D.C. for the Middle District of Alabama. (U.S.C.A. for the 11th Circuit record included). (4 boxes)
Oct 19 2009	Reply of petitioner Holly Wood filed. (Distributed)

Nov 4 2009	Argued. For petitioner: Kerry A. Scanlon, Washington, D.C. For respondents: Corey L. Maze, Solicitor General, Montgomery, Ala.
Nov 6 2009	Letter, dated November 6, 2009, received from counsel for the petitioner. (Distributed).

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PETITION FOR WRIT OF CERTIORARI

(9)

CAPITAL CASE

No. 08-9156

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

HOLLY WOOD, Petitioner,

v.

RICHARD ALLEN, Commissioner, Alabama Department of Corrections, TROY KING, the Attorney General of Alabama, and GRANTT CULLIVER, Warden, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise?

2. Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?

3. Whether a state court unreasonably applies *Atkins v. Virginia* when it bases its finding that a defendant does not have significant deficits in adaptive functioning and thus is not mentally retarded on an analysis of the defendant's relative strengths in adaptive functioning without considering the defendant's limitations, which is inconsistent with the accepted and established clinical definitions of mental retardation?

4. Whether a petitioner seeking habeas relief in federal court may rely on a comparative juror analysis to demonstrate a *Batson v. Kentucky* violation where that analysis is based on facts from the state trial court record, but was not presented to the state trial court?

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CAPITAL CASE

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OCTOBER TERM, 2008

HOLLY WOOD, Petitioner,

v.

RICHARD ALLEN, Commissioner, Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama, and
GRANTT CULLIVER, Warden, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Holly Wood respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which reversed the District Court's grant of habeas corpus relief on ineffective assistance of counsel grounds and affirmed the District Court's denial of habeas corpus relief in all other respects in this case.

OPINIONS BELOW

The Eleventh Circuit's decision is reported at *Wood v. Allen*, 542 F.3d 1281 (11th Cir. 2008), and is attached as Appendix A. The District Court's decision is reported at *Wood v. Allen*, 465 F. Supp. 2d 1211 (M.D. Ala. 2006), and is attached as Appendix B. The decision of the Alabama Court of Criminal Appeals affirming the denial of Mr. Wood's state post-conviction petition is reported at *Wood v. State*, 891 So. 2d 398 (Ala. Crim. App. 2004). The decisions of

the Alabama Court of Criminal Appeals and Alabama Supreme Court on direct appeal are reported at *Wood v. State*, 715 So. 2d 812 (Ala. Crim. App. 1996), and *Ex parte Wood*, 715 So. 2d 819 (Ala. 1998), *cert. denied*, 525 U.S. 1042 (1998).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006). The Eleventh Circuit entered its judgment on September 16, 2008, and denied Mr. Wood's timely petition for rehearing and rehearing *en banc* on November 12, 2008. *See* Appendix C. On January 28, 2009, Justice Thomas granted Mr. Wood's timely application for a thirty-day extension to file this petition for a writ of certiorari up to and including March 12, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d), (e)(1) (2006).

STATEMENT OF THE CASE

I. Mr. Wood's Trial

Petitioner Holly Wood is a black man with an IQ less than 70. He has been sentenced to death for a capital murder, after a trial at whose penalty phase he was represented by Kenneth Trotter, a recently-admitted lawyer who lacked any criminal law experience. (Vol. 17, Aug. 22, 2001 Tr. at 14-15.)[1] Mr. Wood was assigned two more experienced trial counsel, Cary Dozier and Frank Ralph, but they "basically designated" Trotter to "do the sentencing aspect." (Vol. 16, Sept. 18, 2000 Tr. at 15.) Despite Trotter's inexperience and the life-or-death consequences at stake, Trotter was left to "handle[] the aggravating circumstances and mitigating circumstances as far as the sentencing process went." (Vol. 16, Sept. 18, 2000 Tr. at 15.) In effect, Trotter was left to sink or swim.

---

[1] At the time of Wood's trial, Alabama law required attorneys appointed in capital cases to have at least five years experience in criminal law. *See* ALA. CODE § 13A-5-54 (1994).

Trotter found himself increasingly isolated and working on his own. Shortly before the trial, he told the Southern Poverty Law Center that he did not "have anyone with whom to discuss the case, *including the two other attorneys*." (Vol. 18 at 31 (emphasis added).)

Not surprisingly, the investigation into mitigation evidence for use at the penalty phase was woefully inadequate. Ralph, who originally was supposed to handle the penalty phase, testified unequivocally that he did not participate in any investigation for the penalty phase. (Vol. 16, Sept. 18, 2000 Tr. at 73.) Mr. Wood's private investigator, Pete Taylor, did not even know the definition of mitigating circumstances. (Vol. 17 Aug. 23, 2001 Tr. at 93.) As a result of a competency evaluation that had been prepared at their request, trial counsel obtained a Outpatient Forensic Evaluation Report, dated May 13, 1994 ("Competency Report"), that concluded that Mr. Wood was competent to stand trial. (Vol. 7 at 244.) However, the Competency Report observed, among other things, that Mr. Wood had "an IQ in the borderline range of intellectual functioning," was "reading on a 3rd grade level," "is functioning, at most, in the borderline range of intellectual functioning" and "could not use abstraction skills much beyond the low average range of intellect." (Vol. 7 at 242-43.) Despite this clear evidence of mental impairments, neither Trotter nor either of his co-counsel pursued that evidence as a mitigating factor. (Vol. 17, Aug. 21, 2001 Tr. at 45, 51, 56-58, 61, 65.) Indeed, on the morning of the sentencing hearing before the jury, Trotter conceded that, even though trial counsel were on notice four months earlier, "[n]o further investigation has been done" into the issues of Mr. Wood's subaverage mental functioning that had been raised by the Competency Report. (Vol. 5 at 967.)

For example, counsel never spoke to Mr. Wood's teachers, who would have testified, among other things, that Mr. Wood was classified as "educable mentally retarded" and

was placed in special education classes. (Vol. 16, Sept. 18, 2000 Tr. at 128, 148; Vol. 17, Aug. 22, 2001 Tr. at 22; Vol. 17, Sept. 18, 2000 Tr. at 211-12, 215; Vol. 28, Aug. 4, 2003 Tr. at 36.) In addition, counsel never obtained an independent psychological evaluation of Mr. Wood, which would have confirmed, consistent with his teachers' testimony, that Mr. Wood is either mentally retarded or operating in the borderline range of intellectual functioning. As explained below, even the State's experts conceded during the state court Rule 32 proceeding that Mr. Wood has significant deficits in intellectual functioning (IQ below 70) and significant deficits in at least one area of adaptive functioning (functional academics) that manifested prior to the age of eighteen. But the jury considering Mr. Wood's sentence never heard that evidence. Trial counsel's failure to investigate, develop and present this mitigating evidence to the jury was not a strategic decision, but instead was simply the result of a gross lack of diligence, experience and judgment.

At the penalty phase hearing, the State argued the existence of three aggravating circumstances: (1) the crime had been committed during the course of a burglary; (2) Mr. Wood had a prior violent felony conviction; and (3) the crime was committed while Mr. Wood was on parole. Trotter called four of Mr. Wood's family members as witnesses during the penalty phase, who he identified at the courthouse the night before the penalty phase presentation to the jury. He had not met with them prior to Mr. Wood's conviction. (Vol. 17, Aug. 22, 2001 Tr. at 36, 121; Vol. 16, Sept. 18, 2000 Tr. at 170-71.)

After the presentation of evidence, the jury recommended that Mr. Wood be sentenced to death by a vote of 10 to 2 (Vol. 6 at 1087), which is the bare minimum necessary for such a recommendation under Alabama law. *See* ALA. CODE § 13A-5-46 (1994).

Interestingly, 10 to 2 was also the racial make-up of Mr. Wood's jury: 10 white jurors and 2 black jurors. During the *voir dire* phase of Mr. Wood's trial, the State used two-thirds of its peremptory strikes to exclude potential black jurors on the basis of their race, and its justification for their removal was a pretext for discrimination. (Vol. 2 at 356-58; Vol. 11 at 954-55.) At least eight times, the State's proffered explanation for striking black panelists applied to otherwise similarly situated white panelists. For example, the State struck a black panelist solely because she did "not believe in an eye for an eye or in capital punishment." (Vol. 2 at 362.) However, the State did not strike three white panelists, including the eventual jury foreman, who also stated that they did not believe in an "eye for an eye" punishment. (*Id.* at 249, 251, 300.) The State struck another black panelist because he did not believe in an "eye for an eye" punishment and had a family member who was caught stealing. In contrast, the State did not exclude a white panelist, even though he did not believe in an "eye for an eye" punishment and had an aunt who was convicted of manslaughter. (Vol. 2 at 299, 363-64; Vol. 11 at 815.) With one exception, the State did not even question the black panelists about the reasons it gave for striking them. The prosecution simply lifted the information for its supposedly neutral explanations from juror questionnaires, which also indicated the panelists' race. (Vol. 10 at 707.) As a result of the State's discriminatory peremptory strikes, the jury that ultimately convicted Mr. Wood of capital murder and recommended that he be sentenced to death was comprised of 10 white jurors and 2 black jurors.

The trial court accepted the jury's recommendation, finding that the State had proven three aggravating circumstances and that there were no mitigating circumstances, and sentenced Mr. Wood to death. (Vol. 6 at 1123-26.) Mr. Wood's conviction and sentence were

affirmed on direct appeal. *Wood*, 715 So. 2d 812; *Ex parte Wood*, 715 So. 2d 819, *cert. denied*, 525 U.S. 1042 (1998).

II. The State Court Post-Conviction Proceedings

On November 30, 1999, Mr. Wood filed a timely petition for post-conviction review under Alabama Rule of Criminal Procedure 32. (Vol. 18, 48-213.) Among other claims, Mr. Wood sought relief on the grounds that: (1) his counsel rendered ineffective assistance at the penalty phase of his trial in violation of his Sixth and Fourteenth Amendment rights ("ineffective assistance claim"); (2) his execution would violate the Eighth Amendment because he is mentally retarded ("*Atkins* claim"); and (3) the District Attorney exercised peremptory strikes in a racially discriminatory manner in violation of the Fourteenth Amendment ("*Batson* claim").

After the presentation of evidence at an evidentiary hearing over two days on September 18, 2000 and August 22, 2001, the Alabama Attorney General's Office filed a proposed 73-page order setting forth the Attorney General's legal and factual assertions. On November 27, 2001, the state court signed the Attorney General's proposed order *verbatim* and denied Mr. Wood's Rule 32 petition in its entirety. Appendix D. In part, this order found that "the record also shows that trial counsel investigated a potential mental health defense, but decided against presenting it." Pet. App. 201a. This finding is unsupported by the evidence.

While Mr. Wood's case was on appeal to the Alabama Court of Criminal Appeals ("CCA"), this Court issued its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the Eighth Amendment of the U.S. Constitution prohibits the execution of the mentally retarded. On April 25, 2003, the CCA remanded the case to the circuit court to conduct an evidentiary hearing on whether Mr. Wood is mentally retarded and whether his trial attorneys rendered

ineffective assistance due to their failure to develop and present evidence of Mr. Wood's mental retardation. *Wood*, 891 So. 2d at 411.

Each of the clinical psychologists who testified at the evidentiary hearing confirmed that, for purposes of determining whether Mr. Wood was mentally retarded, the standards developed by the American Association of Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), and referenced in *Atkins*, should be used. Under the AAMR definition, mental retardation is "characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work," manifesting themselves prior to the age of 18. *Atkins*, 536 U.S. at 308 n.3 (*quoting Mental Retardation: Definition, Classification, and Systems of Supports 5* (9th ed. 1992) ("AAMR 1992")). The APA definition is similar to the AAMR definition. *See Atkins*, 536 U.S. at 308 n.3 (*quoting* APA, *Diagnostic and Statistical Manual of Mental Disorders 41* (4th ed. 2000) ("DSM-IV")).

The state court record is undisputed that Mr. Wood has significantly subaverage intellectual functioning, which manifested prior to the age of eighteen. Both Mr. Wood's expert, Dr. Salekin, and the State's experts, Dr. McClaren and Dr. Prichard, agreed that "Wood's IQ falls within the range of mentally retarded" and that his significant deficits in intellectual functioning "most likely" manifested prior to the age of eighteen. (Vol. 28, Aug. 4, 2003 Tr. at 88, 90, 163, 187; Vol. 29 at 47, 51, Aug. 4, 2003 Tr. at 235.) The conclusion reached by each of the experts was confirmed by the testimony of two special education teachers who taught Mr. Wood from age twelve to sixteen. (Vol. 28, Aug. 4, 2003 Tr. at 34, 48, 50, 51.)

With respect to adaptive functioning, all the experts agreed that Mr. Wood has significant limitations in functional academics, which manifested prior to the age of eighteen. Based on the results of a Wide Range Achievement Test ("WRAT") that Dr. Salekin administered to Mr. Wood, Dr. Salekin determined that "Wood's reading ability was assessed to be at the sixth grade level (4th percentile), his spelling was assessed to be at the third grade level (0.9th percentile), and his arithmetic score was assessed to be at the third grade level (0.8th percentile)." (Vol. 29 at 47; Vol. 28, Aug. 4, 2003 Tr. at 93-94.) Based on a WRAT test that Dr. McClaren administered to Mr. Wood, Dr. McClaren testified that Mr. Wood's "functional academics are very low, like second to fourth grade level," which "I believe, is an area that he functions in the mentally retarded range." (Vol. 28, Aug. 4, 2003 Tr. at 186.) Likewise, Dr. Prichard testified that Mr. Wood has "some limitations in academic function; reading, writing, and arithmetic essentially." (Vol. 29, Aug. 4, 2003 Tr. at 219.) These findings are consistent with the competency evaluation performed at the time of Mr. Wood's trial that reported that Mr. Wood was "reading on a 3rd grade level." (Vol. 7 at 243.)

Thus, having established by consensus that Mr. Wood has significant limitations in one of the listed adaptive skill areas, the issue before the state court was whether Mr. Wood has significant limitations in at least one other area of adaptive functioning. The state court record shows that Mr. Wood also has significant limitations in the adaptive skill areas of communication, social skills, and self-direction, as demonstrated by the responses to the Vineland questionnaires. (Vol. 29, Aug. 4, 2003 Tr. at 4, 17, 30, 33, 226-27.)[2] For example, the questionnaire responses of Mr. Wood's former special education teachers indicate that Mr. Wood

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[2] The expert psychologists administered Vineland questionnaires to various individuals who knew Wood as a method for evaluating his adaptive functioning.

has difficulty controlling his anger, refraining from asking questions or making statements that may embarrass or hurt others, and setting realistic goals and following through with them. (Vol. 29 at 5, 14, 21, 30.) In the same vein, Ralph testified that he tried to talk to Mr. Wood, "but he was basically very non-communicative" and that "[m]ost of the time when we would ask him questions, he wouldn't even answer us." (Vol. 16, Sept. 18, 2000 Tr. at 75-76.) Similarly, Trotter testified that "Wood was more or less a passive participant in the [trial and preparation] process . . . ." (Vol. 17, Aug. 22, 2001 Tr. at 52.) Analyzing Mr. Wood's bizarre behavior after being stopped for speeding (Vol. 28, Aug. 4, 2003 Tr. at 23-31), Dr. Salekin explained that Mr. Wood's judgment "was quite impaired" and that he does not "understand[] the consequence[s] of his own behavior at times." (*Id.* at 127-28.)

Although the clinically accepted definitions of mental retardation focus specifically on whether an individual has *limitations* in adaptive functioning, the state court's order rejecting Mr. Wood's *Atkins* claim ignored the evidence of Mr. Wood's limitations and focused instead on Mr. Wood's supposed relative *strengths*: (1) "Wood was able to obtain and maintain employment," Pet. App. 245a; (2) "Wood is able to function well independently and does not need the assistance of others to complete his daily tasks," Pet. App. 247a; and (3) "Wood is able to form and maintain interpersonal relationships with others." Pet. App. 250a. On January 6, 2004, the CCA adopted the circuit court's findings and affirmed. *Wood*, 891 So. 2d at 413. The Alabama Supreme Court denied Mr. Wood's petition for certiorari. *Ex parte Wood*, 715 So. 2d at 824.

III. The Federal Habeas Proceedings

On May 26, 2004, Mr. Wood filed a petition for a writ of habeas corpus in which he asserted his ineffective assistance, *Atkins* and *Batson* claims, among others. Petition for Writ of Habeas Corpus By Prisoner in State Custody Under Death Sentence, *Wood v. Campbell, et al.*,

No.2:04 cv509 (M.D. Ala. filed May 26, 2005). On November 20, 2006, the District Court denied Mr. Wood relief on his *Atkins* and *Batson* claims and granted relief on his ineffective assistance claim. Appendix B.

With respect to the *Atkins* claim, the District Court deferred to the state court's decision, which was copied *verbatim* from the State's proposed order, and found that the decision involved neither an unreasonable application of *Atkins* nor an unreasonable determination of the facts. Pet App. 121a. The district court rejected Mr. Wood's argument that the decision was unreasonable because the state court focused on Mr. Wood's relative strengths in adaptive functioning as opposed to his weaknesses. Pet. App. 122a (citing Vol. 28 at 189). The District Court also rejected Mr. Wood's *Batson* claim on procedural grounds, finding that his trial counsel had neglected to present to the state trial court "any argument or evidence of comparability between the potential African American jurors who were struck and any white potential jurors who were not struck by the defense." Pet. App. 128a.

With respect to the ineffective assistance claim, the District Court found "nothing in the record to even remotely support a finding that counsel made a strategic decision not to let the jury at the penalty stage know about Wood's mental condition." Pet. App. 147a. The District Court held that "the clear and convincing record evidence indicates that Trotter, who did not have the requisite years of experience, was left to conduct the mitigating evidence investigation on his own with little assistance from the attorneys who had the requisite experience, and did not make a strategic decision not to pursue or present evidence of mental retardation." Pet. App. 146a. The District Court concluded that "[a] finding by the state courts that a strategic decision was made not to investigate or introduce to the sentencing jury evidence of mental retardation is an unreasonable determination of the facts in light of the clear and

convincing evidence presented in the record." Pet. App. 147a. The District Court further found that "there is a reasonable probability that evidence of Wood's intellectual functioning, even if it had not been enough to establish that he was mentally retarded and had merely demonstrated that he was on the borderline of mental retardation, would have established a non-statutory mitigating circumstance" and that "[c]ounsel's failure to investigate and present any evidence of intellectual functioning, therefore, is sufficient to undermine confidence in the application of the death sentence." Pet. App. 151a.

As a result, the District Court ordered the State "to either (1) vacate Holly Wood's sentence and resentence him to life without possibility of parole, or (2) conduct a new sentencing hearing for Holly Wood that is consistent with the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984)." Pet. App. 152a. The State appealed the District Court's order, and the District Court granted Mr. Wood a certificate of appealability to cross-appeal from the denial of his *Atkins* and *Batson* claims.

On appeal, the Eleventh Circuit affirmed the denial of Mr. Wood's *Atkins* and *Batson* claims, and a divided panel reversed the grant of relief on his ineffective assistance claim. Appendix A. The Eleventh Circuit did not specifically address Mr. Wood's argument that it was unreasonable for the state courts to focus on Mr. Wood's relative strengths instead of limitations in adaptive functioning in reaching a decision on Mr. Wood's mental retardation. With respect to Mr. Wood's ineffective assistance claim, restricting its obligation under AEDPA to "examining whether there is evidence to support the state courts' findings" (Pet. App. 50a n.23), the majority held that "the Rule 32 evidence amply supports the state courts' fact findings" that "(1) 'counsel decided that calling Dr. Kirkland [who prepared the Competency Report] would not be in Wood's best interest'; and (2) 'counsel investigated a potential mental health defense,

but decided against presenting it.'" Pet. App. 48a. The majority also held that Mr. Wood had failed to establish prejudice, although it did not purport to base that conclusion on any fact findings of the state court. Pet. App. 61a-71a.

The dissent concluded that, in contravention of Supreme Court and Eleventh Circuit precedent, the majority opinion "altogether disregards direct and specific evidence" contrary to "the state court's finding that Wood's counsel decided against pursuing or presenting evidence of Wood's mental impairments." Pet. App. 73-74a. As for prejudice, the dissent stated that "evidence of Wood's mental deficiencies was essential to mitigation" and, given the statutory minimum death penalty vote of 10 to 2, "there is a reasonable probability that the outcome of Wood's penalty phase would have been different had Wood's lawyers rendered effective assistance of counsel." Pet. App. 90a, 92a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari To Resolve A Conflict Regarding The Application Of AEDPA To The Review Of State Court Decisions Involving Factual Determinations

A. There Is A Conflict Among The Circuits Regarding The Interaction Of Sections 2254(d)(2) And 2254(e)(1)

Review of state court fact determinations is governed by two distinct subsections of AEDPA. Under 28 U.S.C. § 2254(d)(2), a federal court can grant a writ of habeas corpus with respect to a claim adjudicated on the merits in a state court proceeding where the adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" and the "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

"[A]lthough AEDPA is now over a decade old, courts, commentators and practitioners all continue to struggle to make sense of [these two] provisions dealing with questions of fact in federal habeas proceedings." Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(D)(2) and (E)(1)*, 82 Tul. L. Rev. 385, 387 (2007); *see Teti v. Bender*, 507 F.3d 50, 57 (1st Cir. 2007) ("The relationship between § 2254(d)(2) and § 2254(e)(1), both of which apply to state court fact determinations has caused some confusion"), *cert. denied*, 128 S. Ct. 1719 (2008); *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004) ("Despite the Supreme Court's pronouncements in *Miller-El* and *Wiggins*, a comprehensive interpretation of AEDPA's factual review scheme has yet to emerge from the federal courts"), *cert. denied*, 544 U.S. 1063 (2005); Wright, Miller, Cooper & Amar, *Federal Practice & Procedure: Jurisdiction 3d* § 4265.2 at 357 (2007) ("It is not clear how this invitation to decide whether the state fact determinations were reasonable will fit with the presumption that the state fact determinations are correct").

Lacking definitive guidance, the Courts of Appeals have divided over how to review state court factual findings under AEDPA. In *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *cert. denied*, 543 U.S. 1038 (2004) the Ninth Circuit held that where a habeas petitioner challenges state court factual findings "based entirely on the state record," a federal court only reviews those findings for their reasonableness under 2254(d)(2). Writing for that Court, (now Chief) Judge Kozinski explained, "[t]he additional requirements of 2254(e)(1) do not apply in that situation, because the challenge is governed by the deference implicit in the 'unreasonable determination' standard of section 2254(d)(2)." *Id.* at 1000. If, however, a habeas petitioner challenges state court factual findings based in part on evidence that was extrinsic to the state court record, 2254(e)(1)'s requirements "come into play once the state court's fact-

findings survive any intrinsic challenge" under 2254(d)(2). *Id.* Thus, the federal court first reviews the state court's factual findings to determine if they were reasonable *in light of the state court record*, and if they are, those findings are then presumed correct unless rebutted by clear and convincing evidence *that was not part of the state court record* (and was appropriately introduced in the federal habeas proceedings under 2254(e)(2)).

The Third Circuit likewise has held that "the language of § 2254(d)(2) and § 2254(e)(1) implies an important distinction: § 2254(d)(2)'s reasonableness determination turns on a *consideration of the totality of the 'evidence presented in the state-court proceeding,'* while § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record." *Lambert*, 387 F.3d at 235 (emphasis added).

By contrast, other Courts of Appeals, including the Eleventh Circuit, have held that section 2254(e)(1) applies even where, as here, the petitioner challenges state court decisions based *solely* on the state court record under section 2254(d)(2). Pet. App. 6a-7a; *Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir. 2006) ("Trussell is only entitled to federal habeas relief if the state court made 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' 28 U.S.C. § 2254(d)(2), which requires clear and convincing evidence that the state court's presumptively correct factual finding lacks evidentiary support"), *cert. denied*, 549 U.S. 1034 (2006).[3] The Eleventh Circuit in this case evaluated the

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[3] Still other Courts of Appeals hold that section 2254(d)(2)'s standard can be satisfied by showing, under section 2254(e)(1), that a state court decision "rests upon a determination of fact that lies against the clear weight of the evidence" because such a decision "is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable." *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008) (internal quotations omitted).

reasonableness of the state court's factual determinations under 2254(d)(2) by assessing whether, "[a]t a minimum," Mr. Wood presented clear and convincing evidence rebutting those factual determinations. Pet. App. 50a n.23.

Importing the "clear and convincing evidence" standard to the state court record, contrary to the Ninth and Third Circuit's construction of AEDPA, leads these federal courts to ignore this Court's teaching that defects in the state court's fact finding "can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable" *Taylor*, 366 F.3d at 1001 (citing *Wiggins v. Smith*, 539 U.S. 510, 527-528 (2003) and *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003)). Thus, in this case, notwithstanding that the state courts ignored critical evidence supporting Mr. Wood's ineffective assistance claim, the Eleventh Circuit concluded that the state courts' factual determinations were reasonable because, "there is evidence to support the state courts' findings." Pet. App. 50a n.23. Under this approach of "see if there is *any* evidence to support what the state court found," the court abdicated its responsibility to review the *entire* record and instead made its determination of reasonableness on the basis of only *part* of the record.

In *Miller-El*, 537 U.S. at 341, this Court taught that it is "incorrect . . . to merge the independent requirements of §§ 2254(d)(2) and (e)(1)." As the Court explained:

> AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief . . . .

Id. at 341-42. The Court, however, has not decided whether section 2254(e)(1) always applies in the context of review under section 2254(d)(2) even when that review is based solely on the state

court record, nor, assuming that it does, how the two provisions interact in a court's ultimate assessment of whether to grant habeas relief under section 2254(d)(2). *See Rice v. Collins*, 546 U.S. 333, 339 (2006) ("Although the Ninth Circuit assumed § 2254(e)(1)'s presumption applied in this [2254(d)(2)] case, the parties disagree about whether and when it does. We need not address that question"). The Eleventh Circuit's insistence that state court decisions must be accepted as reasonable even if they ignore critical evidence in the record, unless the subsidiary factual findings are refuted by "clear and convincing evidence," is in tension with *Miller-El*'s admonition that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review" and "does not by definition preclude relief." 537 U.S. at 340.

Further, in *Wiggins v. Smith*, 539 U.S. 510, 526 (2003) this Court held that a habeas petitioner had satisfied his burden under AEDPA where "[t]he record of the actual sentencing proceeding underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." The Court concluded that when viewed in light of the record of the actual sentencing proceeding, "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id.* at 526-27. The Court should grant certiorari to ensure that federal courts are conducting the meaningful reasonableness review required by section 2254(d)(2).

B. Contrary To AEDPA, The Eleventh Circuit Failed To Conduct The Reasonableness Analysis Required Under Section 2254(d)(2), Which Resulted In Abandonment Of Judicial Review

1. The Eleventh Circuit Failed To Review The Reasonableness Of The State Court's Decision In Light Of The State Court's Failure To Consider The Entire State Court Record, Including Trial Counsel's Admission That They Did Not Make A Strategic Decision Regarding The Introduction Of Mental Health Mitigation Evidence At The Penalty Phase

The state court's finding that counsel made a strategic decision after an investigation not to present evidence of Mr. Wood's impaired intellectual functioning was based almost exclusively upon the testimony of Dozier who speculated about what he "would have" done with respect to events *six years* prior to his testimony because he had no specific recollection about what trial counsel did or why they did or did not make certain decisions at the penalty phase, and had "no files" from Mr. Wood's case that might shed light on that issues. Pet. App. 19a, 49a; (Vol. 16, Sept. 18, 2000 Tr. at 57, 58, 61.).

But even Dozier's testimony does not support the state court's finding that he made a decision not to pursue and present mental health mitigation evidence.

> Q. Did you ever consider using Dr. Kirkland's report, the evaluation that we discussed, at the penalty phase?
>
> A. I don't recall. I'm sure I might have presented it at the sentencing phase. It's part of the court record, so I'm sure it was introduced somewhere.
>
> * * *
>
> Q. Did you, in fact, make a determination not to present evidence based on anything you read in Kirkland's report?
>
> A. I don't recall.

(Vol. 16, Sept. 18, 2000 Tr. at 56-57, 61.)[4] Moreover, Dozier testified that trial counsel would have presented information in the Competency Report that they found useful to Mr. Wood at the penalty phase and would have presented information about "mental health problems" at the penalty phase if that information had been available. (*Id.* at 57, 58.) But the Competency Report indicated that information about mental health problems was available and trial counsel did nothing to develop that information and did not present it to the jury when it would have mattered most.

More importantly, the state court finding that counsel made a strategic decision is contradicted by trial counsel's own admission that they failed to investigate Mr. Wood's mental health problems. Thus, the state court record cannot reasonably be characterized as "silent" as to why evidence of Mr. Wood's "mental deficiencies was not presented to the jury in the penalty phase." Pet. App. 50a, 52a. Trotter plainly answered that question on the morning of the sentencing hearing when he told the trial judge that "[n]o further investigation has been done, psychologically of those points" even though the Competency Report "indicates that the defendant may have psychological problems *that need further assessment*." (Vol. 5 at 967 (emphasis added)). There would have been no reason for Trotter to seek an independent psychological evaluation of Mr. Wood if, as the state court concluded, counsel had made a decision that the Competency Report itself constituted a sufficient investigation and there was nothing in it that merited counsel's further consideration.

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[4] When asked to describe counsel's general strategy at the penalty phase, Dozier testified "Only thing I remember was something about his childhood, and I don't recall what it was all about. I just don't recall. I mean, that's been a long time ago." (Vol. 16, Sept. 18, 2000 Tr. at 55.)

In addition, after the penalty phase before the jury, but before sentencing by the trial court, Trotter wrote to his co-counsel reiterating that "we should request an independent psychological evaluation -- even if that means asking for a postponement of the sentencing hearing [before the judge]." (Vol. 18 at 27-28.) The record reflects that Counsel's failure to request an independent psychological evaluation at that late date was not based on a weighing of the pros and cons for Wood, but solely based on their conclusion "that the judge would never grant a continuance or they didn't think the Judge would grant a continuance." (Vol. 17, Aug. 22, 2001 Tr. at 47-48.) Furthermore, Trotter submitted the Competency Report at the sentencing hearing before the trial court and referred specifically to matters in the Report that the state court found trial counsel had decided not to pursue and present.[5]

These facts demonstrate, as the district court (Pet. App. 146a-47a) and the Eleventh Circuit dissent concluded, that counsel "realized too late what any reasonably prepared attorney would have known: that evidence of Wood's mental impairments could have served as mitigating evidence and deserved investigation so that it could properly be presented before sentencing." Pet. App. 85a-86a.

The state court decision (copied verbatim from the State's proposed findings) does not even address any of the critical evidence regarding the actual penalty and sentencing proceedings. Under the Ninth Circuit's construction of AEDPA, that "failure to take into account and reconcile key parts of the record" itself is sufficient to conclude that the state court's

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[5] The fact that counsel belatedly introduced evidence with no context at the sentencing phase before the trial judge does not cure the failure to do a proper investigation and present mitigating evidence to the jury. *See Brownlee v. Haley*, 306 F.3d 1043, 1075 (11th Cir. 2002) ("the role of the advisory jury is so essential that a failure to present mitigating evidence to the jury cannot easily be cured at the judicial sentencing stage").

decision was an unreasonable determination of the facts under section 2254(d)(2). *See Maddox*, 366 F.3d at 1008.

The Eleventh Circuit's holding has far reaching implications. Post-conviction proceedings commenced after direct appeals typically involve testimony of trial counsel years after the trial. In many cases, like this one, counsel's recollection of events will have faded. If, as the Eleventh Circuit held, counsel's testimony concerning what they "would have" done can trump direct evidence of what they said and did contemporaneously at trial, state court decisions based on counsel's vague speculation will become unassailable on federal habeas review.

It is critical that the Court resolve the conflict between the Courts of Appeals over the applicability of 2254(e)(1) to 2254(d)(2) and determine what inquiry a federal court should undertake when determining whether to grant habeas under 2254(d)(2). Had the Eleventh Circuit applied the correct inquiry in this case, which Judge Kozinski articulated in *Maddox*, it would have granted Mr. Wood's ineffective assistance claim. Indeed, as the district court and the dissenting Eleventh Circuit opinion found, the factual record before the state court merits habeas relief on that claim. If the Court allows the conflict to persist, Courts of Appeals will undoubtedly continue to abdicate their responsibility to conduct meaningful review under the guise of AEDPA deference and to permit unreasonable state court factual decisions to stand. *See Wingo v. Wedding*, 418 U.S. 461, 468 (1974) ("More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact"). Consequently, this Court should grant certiorari.

2. The Eleventh Circuit Also Incorrectly Ruled That The State Court's Factual Findings With Regard To Mr. Wood's Ineffective Assistance Claim Were Not Contradicted By Clear And Convincing Evidence

The evidence described above, all of which the state court ignored, also constitutes clear and convincing evidence that rebuts the state court's subsidiary factual finding

that trial counsel made a strategic decision. Accordingly, even if section 2254(e)(1) applies when a federal court determines whether the state court's decision was an unreasonable determination of the facts based solely on the state court record under section 2254(d)(2), the Eleventh Circuit erred in its application of AEDPA.

C. The Eleventh Circuit Also Misapplied Section 2254(d)(1)

Even accepting the state court's finding that counsel made a strategic decision not to pursue mental health evidence as mitigation evidence, its rejection of Mr. Wood's ineffective assistance claim constituted an unreasonable application of federal law under this Court's precedents, which repeatedly have held that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690); *accord Williams v. Taylor*, 529 U.S. 362, 395-96 (2000).

Other Courts of Appeals have consistently held that the talismanic invoking of a "strategic decision" does not shield a state court decision from scrutiny if that decision was not supported by a reasonable investigation. For example, in *Dickerson v. Bagley*, 453 F.3d 690, 696 (6th Cir. 2006), the Sixth Circuit held that a state court decision constituted an unreasonable application of *Strickland* notwithstanding the state court's determination "of so-called 'strategic decisions' of counsel not to conduct . . . a comprehensive investigation." The Sixth Circuit concluded that had counsel conducted a comprehensive investigation, "reasonable lawyers surely *would not have limited* the mitigation proof in this case . . . [and] would have put on proof that his low IQ brought him close to the line of retardation." *Id.* at 696-97; *see Bond v. Beard*, 539 F.3d 256, 289 (3d Cir. 2008) ("[s]trategy is the result of planning informed by investigation, not guesswork").

1. The Eleventh Circuit Incorrectly Ruled That The State Court's Holding On the Performance Prong Was Not An Unreasonable Application Of This Court's Precedents Where Trial Counsel Admitted That A Decision Not To Present Mental Health Mitigation Evidence Was Not Supported By An Adequate Investigation

In this case, the Eleventh Circuit reversed the district court and deferred to the state court's determination that it was reasonable for counsel not to pursue the matters in the Competency Report suggesting the existence of mental health mitigation evidence. But counsel admitted on the morning of the hearing that those matters "need[ed] further assessment" and that "[n]o further investigation has been done, psychologically, of those points." (Vol. 5 at 967.)

Counsel's determination that the Competency Report was not itself sufficient investigation is hardly surprising in light of the fact that the Competency Report was prepared for the stated purpose of assessing Mr. Wood's "competency to stand trial and mental state at the time of the offense." (Vol. 7 at 240.) "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial." *Atkins*, 536 U.S. at 318. Therefore, "[o]btaining competency evaluations from mental health experts for guilt phase purposes does not discharge counsel's duty to consult such experts for the penalty phase because the considerations involved *are very different in the two phases*." *Belmontes v. Ayers*, 529 F.3d 834, 859 (9th Cir. 2008) (emphasis added).

The issue was not, as the state court found and the Eleventh Circuit accepted, whether trial counsel made a strategic decision not to call Dr. Kirkland as a witness or to present his report to the jury. Pet. App. 50a-53a. Rather, "[i]n assessing the reasonableness of an attorney's investigation. . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Counsel had a duty to develop the potential mental health mitigation evidence so that they could make a decision whether to present it in its

full and proper context. But trial counsels' investigation consisted of little more than interviews with Mr. Wood's family at the courthouse the day before the sentencing hearing began, which revealed nothing about his significantly impaired mental functioning.

In an attempt to bolster that investigation, the Eleventh Circuit relied on state court findings, which do not support the state court's conclusion that it was reasonable for counsel to conclude its investigation of Mr. Wood's severely impaired intellectual functioning with the Competency Report. For example, the majority relied on the state court's finding that "counsel employed investigator Taylor, who met with Wood's family members to seek out mitigation evidence." Pet. App. 56a-57a. But Taylor's contemporaneous notes of those interviews, which he confirmed represented the substance of the interviews (Vol. 17, Aug. 22, 2001 Tr. at 90-91), show that he focused solely on guilt/innocence issues -- not on potential mitigation evidence. (Vol. 18 at 40-47.) Moreover, when asked to define mitigating circumstances, he testified, "As I understand it, mitigating circumstances could and would be such circumstances that would likely tend to cause a person to do a deed or to do a thing or possibly do the crime that he was charged with." (Vol. 17, Aug. 22, 2001 Tr. at 93). That testimony defines a motive for a crime, not mitigating circumstances. Thus, contrary to the court's finding, Taylor could not have investigated mitigation evidence because he clearly did not even know what constitutes mitigation evidence.

The majority also relied on the state court's finding that "counsel attempted to get information from Wood's schools and various Alabama institutions where Wood might have spent time." Pet. App. 57a. But Trotter never sought to enforce the subpoena for school records, never obtained such records, and made no effort to contact Mr. Wood's special education teachers. (Vol. 16, Sept. 18, 2000 Tr. at 128, 148; Vol. 17, Sept. 18, 2000 Tr. at 215; Vol. 28,

Aug. 4, 2003 Tr. at 39-40, 55.) Counsel also never obtained any records from the "various Alabama institutions" before the trial. Just before the penalty phase, Trotter told the court that he had not received the records despite the fact that the judge had granted the request for the records two months prior. (Vol. 5 at 968-71.) On the morning of the penalty phase proceeding, counsel obtained records from the Alabama Department of Pardons and Paroles. Information contained in those records further convinced Trotter that counsel should obtain an "independent psychological evaluation" of Mr. Wood even if that meant seeking a postponement of the sentencing hearing. (Vol. 18 at 27-28.) But counsel never did so, and, in any event, by that time it was too late to present the results of any such investigation to the sentencing jury.

2. The Eleventh Circuit Also Incorrectly Ruled That The State Court's Holding On The Prejudice Prong Of Mr. Wood's Ineffective Assistance Claim Was Not Based On An Unreasonable Application Of This Court's Clearly Established Precedents

The Eleventh Circuit's holding on the prejudice prong is also inconsistent with this Court's precedents. This Court has held that "impaired intellectual functioning is inherently mitigating" and that "[e]vidence of significantly impaired intellectual functioning is obviously evidence that 'might serve as a basis for a sentence less than death.'" *Tennard v. Dretke*, 542 U.S. 274, 287-288 (2004); *see Wiggins*, 539 U.S. at 535 ("diminished mental capacities, further augment his mitigation case"); *Williams*, 529 U.S. at 396 (prejudice established where counsel "failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school"). Such mitigating evidence "is exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004); *see* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559 (1998); Samuel R Gross, *Update: American*

Public Opinion on the Death Penalty -- It's Getting Personal, 83 Cornell L. Rev. 1448, 1468-69 (1998).

Relying largely on its own construction of the facts, which are not entitled to any deference under AEDPA, the Eleventh Circuit held that the state court decision that Mr. Wood was not prejudiced by his counsel's deficient performance was neither an unreasonable determination of the facts nor application of this Court's precedents. According to the majority, presenting evidence of Mr. Wood's significantly impaired intellectual functioning would have allowed the State to introduce the Competency Report, including harmful information concerning the facts of the crime and of past crimes. Pet. App. 64a-65a, 67a. But had counsel done a proper investigation, they could have presented such evidence from sources other than the Competency Report -- including from Wood's special education teachers and an independent psychologist.

Next, the majority found that evidence of Mr. Wood's significantly impaired intellectual functioning "would have been eradicated by the State's overwhelming evidence of Wood's high level of adaptive functioning." Pet. App. 66a. But the evidence concerning Mr. Wood's adaptive functioning bears on whether his undisputed significant deficits in intellectual functioning render him mentally retarded. Evidence of significant deficits in intellectual functioning is "powerful mitigating evidence" even if "adaptive intelligence indicate[] that '[the defendant's] skills were somewhat higher'" than a person with mental retardation. *Brownlee v. Haley*, 306 F.3d 1043, 1070 (11th Cir. 2002).[6]

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[6] In any event, the majority's repeated reference to Wood's "high" level of adaptive functioning has no basis in the state court record. At the Rule 32 hearing, all the experts agreed that Wood has significant deficits in at least one area of adaptive functioning (functional academics). (Vol. 28, Aug. 4, 2003 Tr. at 93-94, 186; Vol. 29 at 47, Aug. 4, (continued...)

Finally, the majority held that any additional mitigating evidence would have been outweighed by the three aggravating circumstances. Pet. App. 68a-69a. But the majority overlooked the fact that even with counsel's deficient performance two jurors recommended a sentence of life without the possibility of parole. Under Alabama law, the agreement of a single additional juror would have precluded a death penalty recommendation. *See* ALA. CODE § 13A-5-46. There is a reasonable probability that at least one additional juror would have been swayed by the "inherently mitigating" evidence (*Tennard*, 542 U.S. at 287) that counsel failed to develop and present.

II. The Court Should Grant Certiorari To Reinforce That Mental Retardation Determinations Must Be Based Upon Scientifically Accepted Standards To Comply With *Atkins*

The Alabama state courts rejected Mr. Wood's mental retardation claim and the District Court and the Eleventh Circuit held that the state courts' decision was not contrary to or an unreasonable application of *Atkins*, or based on an unreasonable determination of the facts in light of the entire record. But the Eleventh Circuit did not address Mr. Wood's argument that the state courts' decision was an unreasonable application of *Atkins* because the state court assessed mental retardation without addressing Mr. Wood's limitations in adaptive functioning, which are the cornerstone of the clinical definitions of mental retardation relied on in *Atkins*.

In *Atkins*, the Court embraced two clinical definitions of mental retardation -- the AAMR and the APA definitions. Under those definitions, mental retardation is characterized by: (1) significantly subaverage intellectual functioning, (2) significant limitations in adaptive

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2003 Tr. at 219.) As to other areas of adaptive functioning, the State's expert testified that "his adaptive skills are probably on the borderline -- high borderline range, potentially in some areas even average." (Vol. 29, Aug. 4, 2003 Tr. at 234.)

functioning, which (3) manifest before the age of 18. *Atkins*, 536 U.S. at 308 n.3 (citations omitted).

Although this Court left "to the State[s] the task of developing appropriate ways to enforce" its holding in *Atkins*, 536 U.S. at 317, this Court did not delegate authority to determine whether the standards adopted by the States were consistent with the Eighth Amendment's prohibition on execution of people with mental retardation. *See Schirro v. Smith*, 546 U.S. 6, 7 (2005) (standards adopted by States under *Atkins* "might, in their application be subject to constitutional challenge"). In other words, "while States are free to adopt variations in the wording of the [mental retardation] definition, they cannot adopt a definition that encompasses a smaller group of defendants, nor fail to protect any individuals who have mental retardation under the definition embodied in the national consensus." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 12 (January/February 2003).[7] This is precisely what has happened in this case and in other cases around the country. Courts are applying definitions of mental retardation that are contrary to the scientifically accepted and established clinical definitions of mental retardation as identified by the Court in *Atkins*. The result is that states are failing "to protect individuals who have mental retardation under the definition embodied in the national consensus." *Id.* at 12.

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[7] *See Walton v. Johnson*, 269 F. Supp. 2d 692, 699 n.4 (W.D. Va. 2003) ("Although *Atkins* left to the States the task of developing a definition of mental retardation, that definition is limited under *Atkins* because it must be consistent with the emerging national consensus and evolving standards of decency described in the Supreme Court's opinion"), *aff'd*, 440 F.3d 160 (4th Cir. 2006) (*en banc*), *cert. denied*, 547 U.S. 1189 (2006).

This non-clinical approach is most evident with respect to the adaptive functioning prong of the mental retardation definition. As discussed above, that prong focuses upon "significant limitations . . . in adaptive behavior." *Mental Retardation: Definition, Classification, and Systems of Supports 5* (10th ed. 2002) ("AAMR 2002") at 1; DSM-IV at 41. The clinical definition thus makes clear that determining limitations in adaptive functioning involves the assessment of what the individual *cannot do*. When assessing adaptive functioning, it is critical to recognize that "[w]ithin an individual, limitations often coexist with strengths." AAMR 1992 at 8.

> This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all other people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. ***These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.***

Id. (emphasis added); *see Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1343 (N.D. Ala. 2006) (*quoting* AAMR 2002), *aff'd, Holladay v. Allen*, No. 06-16026, 2009 U.S. App. LEXIS 2126 (11th Cir. Jan. 30, 2009). "The focus in evaluations (and ultimately adjudications) under the adaptive prong must remain focused on the individual's limitations, rather than any skills he or she may also possess." Ellis, *supra* at 18 n.29. That is because "[t]he skills possessed by individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying." *Id.* Rather, "the presence of confirming deficits must be the diagnostician's focus." *Id.*

In this case, however, the state court determined that Mr. Wood was not mentally retarded by applying a mental retardation standard that is inconsistent with the scientifically

accepted and established definition of mental retardation. Rather than focusing on whether Mr. Wood had limitations in areas of adaptive functioning, as the clinical definition requires, the state court focused upon whether Mr. Wood could do certain things that the court decided "are not typically associated with mentally retarded people . . . ." Pet. App. 246a. The state court thus focused on what Mr. Wood could do rather than whether he had limitations in adaptive functioning. The result is that the state court's determination that Mr. Wood is not mentally retarded is divorced from the clinical definitions of mental retardation and is thus objectively unreasonable.

The same thing has happened in other Alabama cases where courts are continuing to reject *Atkins* claims through the application of non-clinical and idiosyncratic definitions of mental retardation that focus on relative strengths and not limitations in adaptive functioning. *See, e.g., Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002) (denying *Atkins* claim and finding adaptive functioning prong not met because the defendant "was able to have interpersonal relationships . . . [and] maintained a job as an electrician for a short period"); *Smith v. State*, CR-97-1258, 2009 Ala. Crim. App. LEXIS 2, at *10 (Ala. Crim. App. Jan. 16, 2009) (denying *Atkins* claim and finding adaptive functioning prong not met because the defendant "was able to maintain a bank account, to save money, to use medical terms that were not normal for mentally retarded persons to use, and his participation in daily activities and other work showed his planning and thought processes"); *Clemons v. Alabama*, No. CR-01-1355, 2005 Ala. Crim. App. LEXIS 128, at *15, *17-*18 (Ala. Crim. App. June 24, 2005) (denying *Atkins* claim and finding adaptive functioning prong not met because the defendant "was still able to hold a few jobs . . . [had] the ability to form interpersonal relationships with women . . . [and his] post-crime conduct

supports the notion that he was a crafty criminal intent on minimizing his culpability and establishing a defense to his crime . . .").

Other state courts outside Alabama are similarly applying a standard that focuses on relative strengths as opposed to limitations in adaptive functioning. *See, e.g., Briseno v. Dretke*, No. L-05-08, 2007 WL 998743 (S.D. Tex. 2007) (Texas court's decision denying *Atkins* claim was not unreasonable under AEDPA), *aff'd*, No. 07-70034 (5th Cir. May 13, 2008) (unpublished), *cert. denied, Briseno v. Quarterman*, 129 S. Ct. 729 (2008); *Brown v. State*, 959 So. 2d 146, 150 (Fla. 2007) (finding that a mental retardation diagnosis "was contradictory to the evidence that Brown was engaged in a five-year intimate relationship prior to the crime, that he had his driver's license and drove a car, and that he was employed in numerous jobs including as a mechanic"); *Wiley v. State*, 890 So. 2d 892, 897 (Miss. 2004) (denying *Atkins* relief based on what the defendant could do, rather than what he could not do).

This case presents an opportunity for this Court to affirm its holding in *Atkins* and to ensure adherence to the Eighth Amendment's prohibition on the execution of defendants who fall within the clinical definition of mental retardation. In the absence of such instruction from this Court, States will continue to apply non-clinical standards in determining mental retardation and the implementation of this Court's decision in *Atkins* will not be moored to any scientific or clinical definition. It will also permit states to make the life or death determination about a defendant's eligibility for the death penalty by relying upon the prejudicial stereotypes that have burdened the mentally retarded throughout history. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (observing that the mentally retarded "have been subjected to a history of unfair and often grotesque mistreatment").

This Court has not hesitated in the past to rein in States that have applied standards that failed to ensure that Constitutional rights were not violated. For example, in *Panetti v. Quarterman*, 551 U.S. 930 (2007), this Court determined that the Fifth Circuit had applied a definition of competency that was inconsistent with *Ford v. Wainwright*, 477 U.S. 399 (1986), and thus considered petitioner's claim on the merits and did not defer to that determination under 28 U.S.C. § 2254(d). In that case, as here, the Court had initially left it to the States to establish procedures to implement the Court's interpretation of the Eighth Amendment. However, when presented with the Fifth Circuit's interpretation of competency to be executed, which was inconsistent with this Court's holding in *Ford*, the Court granted certiorari and further clarified its holding. So too here, the Court should grant certiorari to hold that states must apply clinically accepted definitions of mental retardation when making *Atkins* determinations, and that the failure to do so results in a decision that is based on an unreasonable application of *Atkins*.

III. The Court Should Grant Certiorari To Review The Eleventh Circuit's *Batson* Holding, Which Conflicts With The Decisions Of This Court And Other Courts Of Appeals

The Eleventh Circuit affirmed the district court's holding that Mr. Wood's *Batson* claim was procedurally barred on the ground "that although Wood raised a *Batson* claim in the state courts, he did not make any sub-argument comparing black venire members who were struck with white members who were not struck." Pet. App. 14a. That holding conflicts with the holdings of this Court and other Courts of Appeals.

During jury selection at Mr. Wood's trial, after the trial court's removals for cause, 56 prospective jurors remained of whom 18 (32%) were black. (Vol. 2 at 353, 356.) The State used 14 of its 21 (67%) peremptory strikes to remove black panelists. (Vol. 2 at 356-58; Vol. 11 at 954-55.) Only two black jurors were seated. (*Id.*)

At trial, Mr. Wood challenged the state's strikes as discriminatory. The trial court determined that Mr. Wood had satisfied his burden to make "out a prima facie case of discriminatory jury selection," thereby shifting the burden "'to the State to come forward with a neutral explanation for challenging . . . [black] jurors.'" *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)).

As demonstrated above, the *voir dire* record showed that at least eight times, the State's proffered explanation for striking black panelists applied to otherwise similarly situated white panelists. The trial court accepted the explanations proffered by the State and denied Mr. Wood's *Batson* motion. On appeal, Mr. Wood argued that the State's proffered explanations for striking at least six black panelists applied to otherwise similarly situated white panelists who ultimately sat on the jury, which reveals those explanations as pretext designed to mask purposeful discrimination. *See* Pet. App. 126a; *Wood*, 715 So. 2d at 816. The District Court declined to address the merits of Mr. Wood's *Batson* claim and the Eleventh Circuit affirmed.

In *Miller-El*, 545 U.S. at 240-41, this Court reversed the denial of habeas relief under AEDPA where the state used two-thirds of its peremptory challenges to strike nearly all black panelists and justified striking two black panelists by referring to characteristics that the black panelists shared with white panelists who were not struck. As the Court explained: "More powerful than . . . bare statistics . . . are side by side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Id.* at 241.

In so holding, the Court relied on the petitioner's arguments based on a comparative juror analysis even though the petitioner had not raised such arguments at trial or on direct appeal. The Court held that such arguments are cognizable because there "can be no question that the transcript of *voir dire*, recording the evidence on which [the petitioner] bases

his arguments . . . was before the state courts." *Id.* at 241 n.2. As the Court explained, there is a difference between "evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Id.*

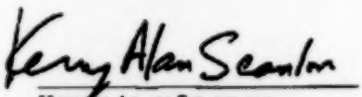
Applying *Miller-El*, the Ninth Circuit has held that a petitioner could rely on comparative juror analysis in federal post-conviction review even though he had not relied on such analysis before the state trial court. *See Boyd v. Newland*, 467 F.3d 1139, 1148 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007). In doing so, the Court of Appeals overturned a precedent decided prior to *Miller-El* because, in *Miller-El*, this Court had "conducted a comprehensive comparative juror analysis on appeal" even though that theory had not been presented in the state trial court. *Id.* Similarly, in *Reed v. Quarterman*, No. 05-70046, 2009 WL 58903, at *5, *8 (5th Cir. Jan. 12, 2009), the Fifth Circuit held that *Miller-El* "directs us to consider the comparative analysis" offered by a petitioner on federal habeas review even though that theory had not been presented in the state trial court because "the comparative analysis simply was a theory that involved the evidence before the state court." The Eleventh Circuit's holding in this case that Mr. Wood's *Batson* claim is procedurally barred because his trial counsel failed to present a comparative juror analysis notwithstanding the availability of such record evidence, therefore, is directly contrary to the holdings of the Ninth and Fifth Circuits.

This Court should grant certiorari to clarify the circumstances under which a federal court can consider a comparative juror analysis offered as evidence of a *Batson* violation on habeas review and to resolve the conflict in the Courts of Appeals over the application of *Miller-El*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: March 12, 2009

OPPOSITION BRIEF

(10)

No. 08-9156
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

HOLLY WOOD,

Petitioner,

v.

RICHARD ALLEN, Commissioner, Alabama Department of Corrections, TROY KING, the Attorney General of Alabama, and GRANTT CULLIVER, Warden

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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April 13, 2009

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW
(Rephrased)

1. Should this Court grant certiorari to review the Eleventh Circuit's straightforward application of the *Strickland* standard to Wood's splitless and fact-bound claim that his counsel were ineffective for failing to adequately investigate and present evidence of his low intelligence at the penalty phase of his trial?

2. Should this Court grant certiorari to review Wood's claim that the Eleventh Circuit misapplied 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1) in denying relief on his claim of ineffective assistance of counsel where that claim was not raised or addressed in the lower court, is unworthy of certiorari review, and is, in any event, clearly without merit?

3. Should this Court grant certiorari to review the Eleventh Circuit's straightforward application of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), to Wood's splitless and fact-bound claim that he is entitled to penalty phase relief because of his alleged mental retardation?

4. Should this Court grant certiorari to review Wood's claim that the Eleventh Circuit erred in holding that his *Batson* claims are procedurally defaulted where the underlying *Batson* claims are unworthy of certiorari review and clearly are without merit?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties in the courts below.

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On October 20, 1994, a Pike County, Alabama jury found Holly Wood guilty of the capital offense of the murder of Ruby Gosha during the course of a burglary in the first degree, in violation of section 13A-5-40(a)(4) of the Code of Alabama. (Vol. 5, Court reporter's transcript, p. 955.) Following the jury's recommendation, the trial court sentenced Wood to death on December 9, 1994. (Vol. 12, Clerk's record, pp. 999-1011.) The Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed Wood's capital murder conviction and death sentence. *Wood v. State*, 715 So. 2d 812 (Ala. Crim. App. 1996), *aff'd*, 715 So. 2d 819 (Ala. 1998). Thereafter, this Court denied Wood's petition for writ of certiorari. *Wood v. Alabama*, 525 U.S. 1042, 119 S. Ct. 594 (1998).

Wood subsequently filed a petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (Vol. 18, Clerk's record, pp. 48-213.) After holding an evidentiary hearing on Wood's twice amended Rule 32 petition, the Rule 32 circuit court entered an order denying all relief on the claims in his Rule 32 petition. (Vol. 24, Clerk's supplemental record, pp. 9-81.) See Pet. App. D.

On April 25, 2003, the Alabama Court of Criminal Appeals remanded Wood's case to the Rule 32 circuit court with instructions to hold an evidentiary hearing on the following claims: (1) whether Wood's alleged mental retardation renders him ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002); and, (2) whether his counsel were ineffective for failing to develop and present evidence of his alleged mental retardation at the penalty phase of his trial. *Wood v. State*, 891 So. 2d 398, 410-411 (Ala. Crim. App. 2003). Pursuant to the directive of the Alabama Court of Criminal Appeals, the Rule 32 circuit court held an evidentiary hearing on those two claims. On September 24, 2003, the court entered a

comprehensive and thorough order denying relief on those claims. (Vol. 41, Clerk's record, pp. 2390-2446.) See Pet. App. E.[1]

On January 6, 2004, the Alabama Court of Criminal Appeals affirmed the Rule 32 circuit court's denial of Wood's twice amended Rule 32 petition. *Wood*, 891 So. 2d at 411-421. On May 21, 2004, the Supreme Court of Alabama denied Wood's petition for writ of certiorari.

On May 26, 2004, Wood filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Alabama. On November 20, 2006, the district court entered a Memorandum Opinion and Order granting Wood's habeas petition "as to Claim A(1)(e) that Trial Counsel Was Ineffective for Failing to Investigate and Present Evidence of Mr. Wood's Mental Retardation and Mental Disability" and denying relief on the remaining claims in his petition. *Wood v. Allen*, 465 F.Supp.2d 1211, 1245 (M.D. Ala. 2006). See Pet. App. B at 151a-152a. On September 16, 2008, the Eleventh Circuit Court of Appeals affirmed the district court's denial of relief on Wood's *Atkins* and *Batson* claims but reversed the district court's holding that Wood's trial counsel were ineffective at the penalty phase of his trial for failing to investigate and present evidence of his low intelligence. *Wood v. Allen*, 542 F.3d 1281, 1314 (11th Cir. 2008). See Pet. App. A at 72a. On November 12, 2008, the Eleventh Circuit Court of Appeals denied Wood's petition for rehearing and his petition for rehearing *en banc*. See Pet. App. C.

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[1] Although he included the Rule 32 circuit court's 2003 opinion as Appendix E in his appendices, Wood deleted eight pages of that opinion and failed to inform this Court or Respondents that he omitted those pages. As can be seen by reviewing the page numbers on the bottom right-hand side of the circuit court's opinion that Wood identifies as Appendix E, the opinion is 57-pages in length, but Wood failed to include pages 19, 27-30, 39, and 53-54 of the court's opinion in his filing with this Court. Because the missing pages contain findings of fact that were made by the circuit court in reviewing his claim that his counsel were ineffective for failing to present evidence of his low intelligence at the penalty phase of his trial and his *Atkins* claim, Respondents will file an appendix that contains the Rule 32 circuit court's 2003 opinion in its entirety simultaneously with the filing of this brief.

STATEMENT OF JURISDICTION

The statement of jurisdiction contained on page 2 of Wood's petition for writ of certiorari is correct. Wood, however, has not articulated any basis for this Court to invoke its jurisdiction under Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional provisions and statutes involved in this case, which is contained on pages 2-3 of Wood's petition for writ of certiorari, is correct.

STATEMENT OF THE CASE

A. The State Court Proceedings

On September 1, 1993, Holly Wood broke into Annie Gosha's residence in Troy, Alabama. Once inside her home, Wood hurried to the bedroom where Ruby Gosha, Annie's daughter and Wood's ex-girlfriend, was sleeping. Wood placed a shotgun to the right side of Ruby's head and fired one shot. After he killed Ruby, Wood quietly snuck out of Annie's house through the backdoor.

A Pike County grand jury returned an indictment against Wood for this murder on November 16, 1993. The indictment charged Wood with the capital offense of the murder of Ruby Gosha during the course of a burglary in the first degree, in violation of section 13A-5-40(a)(4) of the Code of Alabama. (Vol. 7, Clerk's record, pp. 114-115) Wood was convicted of the capital murder of Ruby Gosha on October 20, 1994. (Vol. 5, Court reporter's transcript, p. 955.) After a sentencing hearing before the jury, the jurors recommended by a vote of ten to two that Wood should be sentenced to death. (Vol. 6, Court reporter's transcript, p. 1087.) On December 9, 1994, the trial court followed the jury's recommendation and sentenced Wood to death. (Vol. 12, Clerk's record, pp. 999-1011.)

On direct appeal, the Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed Wood's capital murder conviction and death sentence. *Wood v. State*, 715 So. 2d 812 (Ala. Crim. App. 1996), *aff'd*, 715 So. 2d 819 (Ala. 1998). This Court denied Wood's petition for writ of certiorari. *Wood v. Alabama*, 525 U.S. 1042, 119 S. Ct. 594 (1998).

On December 1, 1999, Wood filed his petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (Vol. 18, Clerk's record, pp. 48-213.) On September 18, 2000 and August 22, 2001, the Rule 32 circuit court held a hearing on the claims in Wood's twice amended Rule 32 petition and subsequently denied all relief on his claims on November 27, 2001. (Vol. 24, Clerk's supplemental record, pp. 9-81.) See Pet. App. D.

On April 25, 2003, the Alabama Court of Criminal Appeals remanded Wood's case to the circuit court with instructions to hold an evidentiary hearing on his claims that his alleged mental retardation renders him ineligible for the death penalty and that his counsel were ineffective for failing to present evidence of his alleged mental retardation at the penalty phase of his trial. *Wood v. State*, 891 So. 2d 398, 410-411 (Ala. Crim. App. 2003). Pursuant to the court's directive, the circuit court held an evidentiary hearing on those claims on August 4, 2003.

On September 24, 2003, the Rule 32 circuit court entered a detailed order denying relief on Wood's claims. (Vol. 41, Clerk's record, pp. 2390-2446.) See Pet. App. E. On January 6, 2004, the Alabama Court of Criminal Appeals affirmed the Rule 32 circuit court's denial of Wood's twice amended Rule 32 petition. *Wood*, 891 So. 2d at 411-421. On May 21, 2004, the Supreme Court of Alabama denied Wood's petition for writ of certiorari.

B. The Federal Habeas Proceedings

On May 26, 2004, Wood filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Alabama. On November 20, 2006, the district court

granted Wood's habeas petition "as to Claim A(1)(e) that Trial Counsel Was Ineffective for Failing to Investigate and Present Evidence of Mr. Wood's Mental Retardation and Mental Disability" and denied relief on the remaining claims in his petition. *Wood v. Allen*, 465 F.Supp.2d 1211, 1245 (M.D. Ala. 2006). See Pet. App. B. at 151a-152a. On December 7, 2006, Respondents filed their notice of appeal. On December 20, 2006, Wood moved the district court to issue a certificate of appealability as to his *Atkins* and *Batson* claims and filed his notice of cross-appeal. Two days later, the court granted Wood's request for a certificate of appealability as to those two issues.

On September 16, 2008, the Eleventh Circuit Court of Appeals affirmed the district court's denial of relief on Wood's *Atkins* and *Batson* claims but reversed the district court's holding that Wood's counsel were ineffective at the penalty phase of his trial for failing to investigate and present evidence of his low intelligence. *Wood v. Allen*, 542 F.3d 1281, 1314 (11th Cir. 2008). See Pet. App. A at 72a. On November 12, 2008, the Eleventh Circuit denied his petition for rehearing and petition for rehearing *en banc*. See Pet. App. C.

C. Statement of the Facts

1. The Facts of the Crime

On the evening of September 1, 1993, Holly Wood unlawfully entered Annie Gosha's home in Troy, Alabama through the unlocked backdoor. (Vol. 3, Court reporter's transcript, p. 433.) Once inside the residence, Wood rushed to the bedroom where Ruby Gosha was sleeping. *Id.* at 495. While Ruby was asleep in her bed, he placed a shotgun to the right side of her head and fired one shot, killing her. *Id.* Wood then quickly left the residence. *Id.* at 433, 440-441.

Annie Gosha testified that Ruby lived with Wood in Enterprise while they were dating and that Wood is the father of one of her children. *Id.* at 416. After she ended her relationship

with Wood, Ruby and her children moved to Troy to live with Annie, her mother. *Id.* at 415-416. At approximately 5:00 p.m. on September 1, 1993, Wood arrived uninvited at Annie's house. *Id.* at 418, 434. Wood brought with him cigarettes to give to Ruby and Pampers for their child. *Id.* at 418. Ruby and Wood began arguing immediately after he arrived at Annie's house. *Id.* Ruby told him to "go on and leave her alone, to take his cigarettes and Pampers and give them to somebody else, because it was over between them." *Id.* Annie told Wood to leave her property and never return. *Id.* at 419. As he was leaving, Wood told Ruby that he would "get her some day." *Id.* at 420.

Approximately two weeks earlier, Wood "slipped up behind [Ruby] and cut her on the arm" while she was sitting in her automobile. *Id.* at 421-422. Ruby received a serious cut on her wrist and lost the functioning in two of her fingers as a result of this assault. *Id.* at 421-423. Calvin Salter, Wood's cousin, testified that Wood told him that he had intended to stab Ruby in the heart but stabbed her only on her wrist because her arm was in the way. *Id.* at 504.

Salter further testified that Wood stopped by his (Salter's) mother's house in Luverne between 7:00 p.m. and 8:00 p.m. on September 1, 1993. *Id.* at 462. Wood was driving his father's pickup truck at the time. *Id.* at 464. Wood asked Salter if he would travel with him to Troy, and Salter agreed. *Id.* at 462-463. After making one stop, Wood and Salter drove to Troy, with Salter driving. *Id.* at 464.

Later that evening, Wood and Salter drove past the Gosha residence and stopped the truck on a nearby street. *Id.* at 485-486. Wood got out of the truck and asked Salter to circle the block. *Id.* at 486. Complying with Wood's request, Salter drove the truck around the block and parked it by a wall. *Id.* Wood returned to the truck a few minutes later. *Id.* Soon thereafter, they observed a red Grand Prix automobile drive past them, and Wood asked Salter to follow

that vehicle because it was owned by a man named Amp. *Id.* at 487. Wood informed Salter that he would kill Ruby if he caught her and Amp together. *Id.* at 488.

After Amp's vehicle drove past Annie's house, Wood told Salter to turn around and drive back toward her residence. *Id.* at 489-490. When they were near the house, Wood asked Salter to stop the truck. *Id.* at 490. Wood removed a 12-gauge shotgun from the gun rack of the truck, placed it down one of his pant legs, and covered it with his shirt. *Id.* Wood then walked toward Annie's house. *Id.* Salter drove the truck to a nearby apartment complex and parked it next to a telephone booth. *Id.* at 492. While he was waiting for Wood to return, Salter placed a telephone call to his girlfriend and briefly spoke with her. *Id.* at 493.

After finishing his call, Salter started to walk back to the truck, but as he was walking, Wood, who was standing in the street behind the Gosha house, called out to him. *Id.* at 492-493. Salter walked over to him, and Wood told him that he did not see Ruby in the house but that he was going to return to the Gosha residence anyway. *Id.* at 493. Wood walked toward the Gosha residence again, and Salter returned to the telephone booth to place another call. *Id.* at 493-494. Salter testified that he heard a gunshot as he was hanging up the telephone and decided to return to the truck. *Id.* When he arrived at the truck, Wood was sitting in the passenger's seat. *Id.* at 495. Wood told Salter that they should drive back to Luverne. *Id.*

As they were driving back to Luverne, Wood told Salter that he shot Ruby while she was asleep in her bed. *Id.* Salter testified that Wood stated, "I shot that bitch in the head, and blowed [sic] her brains out and all she did was wiggle." *Id.* After telling Salter that he shot Ruby, Wood began to throw 12-gauge shotgun shells out of the car window. *Id.* Wood told Salter that he knew that he had killed Ruby and expected that law enforcement officers would be searching for him. *Id.*

When they arrived in Luverne, Salter and Wood drove to Wood's father's residence. *Id.* They decided to sleep in a shed near Wood's father's home. *Id.* at 499-500. Before they went to sleep, Wood removed the shotgun from the truck, and he and Salter buried the gun under some leaves in a nearby wooded area. *Id.* at 498-499. Troy Police Officer Donald Brown testified that Salter led him to a wooded area near the shed where they retrieved the shotgun under some leaves. (Vol. 4, Court reporter's transcript, p. 659.)

Later that night, Luverne Police Officer Clifton Wells located a vehicle parked at Wood's father's house that matched a description that he had received from a "be-on-the-lookout" bulletin from the Troy Police Department. *Id.* at 608-610. After Wood's father informed him that Wood was in the shed next to his house, Officer Wells found Wood, took him into custody, and transported him to the Luverne Police Department. *Id.* at 612-615.

Troy Police Officer Lewis Fannin subsequently drove Wood from the Luverne Police Department to the Troy Police Department. *Id.* at 712. Officer Fannin testified that Wood became "increasingly belligerent" while they were driving to Troy and suddenly exclaimed, "You mother fuckers must think I am crazy. What do I look [like] going in somebody's house shooting them in the head while they are asleep?" *Id.* at 713. Officer Fannin testified that neither he nor anyone else had informed Wood that Ruby Gosha was shot in the head or that she had been shot while she was asleep before he made that statement. *Id.*

2. Facts from the Rule 32 Evidentiary Hearing

The Rule 32 circuit court held an evidentiary hearing on Wood's twice amended Rule 32 petition on September 18, 2000 and August 22, 2001.

Mr. Cary Dozier, Wood's lead counsel, has been practicing law since 1976. (Vol. 16, Court reporter's transcript (9/18/00), p. 13.) By the time of Wood's trial, Dozier had acquired a

vast amount of trial experience, handling more than a thousand felony jury trials and prosecuting more than one hundred felony and misdemeanor cases. *Id.* at 21-22. In addition, Dozier had handled capital murder cases before he was appointed to represent Wood. *Id.* at 21.

To prepare for Wood's capital murder trial, Dozier met with Wood at least twice and spoke with him on the telephone many times. *Id.* at 19-20. Dozier stated that he had a "very good working relationship" with Wood, and he recalled that Wood cooperated with him and his co-counsel (Frank Ralph and Kenneth Trotter) by providing them with information. *Id.* at 26. He testified that he and his co-counsel followed up on the information that Wood provided to them and that he "had no problems with Wood whatsoever." *Id.* at 26-27.

Dozier categorically denied that he and Frank Ralph asked Kenneth Trotter to be "in charge" of Wood's penalty phase defense. *Id.* at 53. Instead, Dozier testified that all three attorneys participated in the investigation, preparation, and presentation of Wood's penalty phase defense. *Id.* at 16, 53. Dozier testified that he interviewed several witnesses, including Wood's father, in preparing for the penalty phase of the trial. *Id.* at 54. Dozier recalled that Wood's family members were cooperative and provided them with information about Wood's childhood and life that was useful at the penalty phase of the trial. *Id.* at 55.

To assist them in preparing their guilt and penalty phase defense of Wood, Dozier hired an investigator, Pete Taylor, who was "highly recommended" to him by another investigator. *Id.* at 33. Dozier recalled that he asked Taylor to search for evidence that they could use at the penalty phase of the trial. *Id.* at 26, 54.

Moreover, Dozier obtained the notebook on representing capital murder defendants that was prepared by Bryan Stevenson and other attorneys associated with the Capital Resource Center and used that notebook in preparing his defense of Wood. *Id.* at 23. Dozier recalled that

the information in the notebook assisted him and his co-counsel in preparing for the penalty phase of Wood's trial. *Id.*

Because they were concerned about his competency to stand trial and his mental state at the time of the crime, Wood's trial counsel filed a motion for a psychological evaluation. *Id.* at 30-31. Dr. Karl Kirkland evaluated Wood and prepared an expert report summarizing his findings and conclusions based on his evaluation of Wood. *Id.* at 47. Dozier testified that they followed up on the information that was contained in Dr. Kirkland's report. *Id.*

Mr. Frank Ralph testified that he has been a member of the Alabama State Bar Association for over thirty years. *Id.* at 86-87. By the time of Wood's trial, Ralph had handled approximately 50 felony jury trials and hundreds of non-jury trials. *Id.* Ralph testified that Dozier was Wood's lead attorney. *Id.* at 78, 88. With regard to his own trial preparation, Ralph testified that he obtained and studied the notebook that was prepared by the Capital Resource Center. *Id.* at 88. Ralph also actively participated in the investigation and preparation of Wood's penalty phase defense. *Id.* at 99. In particular, Ralph interviewed two of Wood's sisters or one of his sisters and his father and reviewed Dr. Kirkland's report. *Id.* at 92, 102, 104.

Ms. Maeola Wood testified that she is Wood's sister. *Id.* at 149, 153. She recalled that he could be "rebellious." *Id.* at 167. For example, she testified, "He didn't want to participate in school work. If they was having agriculture or something and they tell him he going to have to do something, he'll wear his best clothes and be rebellious when he get there." *Id.*

Ms. Janet Penn testified that she was one of Wood's special education teachers. (Vol. 17, Court reporter's transcript (9/18/00), pp. 210-211.) She recalled that he was an "average" student. *Id.* at 212. When asked how he interacted with other students, she testified, "[H]e got along with some and didn't with others, pretty much like the other kids did." *Id.* at 214.

Mr. Kenneth Trotter was appointed to assist Dozier and Ralph in defending Wood. (Vol. 17, Court reporter's transcript (8/22/01), pp. 6, 14.) Trotter testified that Dozier was Wood's "principal attorney," and he further testified that Dozier was responsible for overseeing all phases of Wood's trial. *Id.* at 12-13. Trotter recalled that Dozier was the "ultimate decision maker" with regard to the defense team's strategies for defending Wood at each phase of the trial. *Id.* at 17, 20, 30.

Dozier asked Trotter to assist him and Ralph in preparing for the penalty phase of Wood's trial. *Id.* at 12. To that end, Trotter interviewed Wood and his family members, among other things. *Id.* at 16-17, 36. Trotter testified as follows regarding that aspect of his mitigation investigation:

> I talked to a lot of Holly's family. I can't recall the ones that I spoke with. But we actually met here at the courthouse. And I spoke to a lot of family members, and I don't recall again specifically which ones of the family I spoke with. But based on that is how I identified the witnesses that we used at the penalty phase.
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> I can't recall when we would have been at the courthouse. I know that there were a number of occasions that Holly would be brought to the courthouse and his family would be here. And on some of those occasions at some point in time, I interviewed the family. We all met in one of the rooms here at the courthouse.

Id. at 36-37.

When he was asked about the substance of his conversations with Wood's family members, Trotter explained that he spoke with them because he was:

> Just trying to get information about Holly's upbringing, background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything that we could use to humanize Holly to make him seem more real to the jury; something that would make him seem more like a human being, somebody that would be worth saving even if that would mean he would spend his life in prison, something that would humanize him to the jury so that

> they would have a reason to give him life in prison as opposed to the death penalty.

Id. at 37.

Mr. Pete Taylor testified that he was employed as an Alabama Bureau of Investigation agent for 22 years and handled numerous capital cases in that capacity. *Id.* at 94. Taylor searched for evidence that could be presented on behalf of Wood at the penalty phase of the trial. *Id.* at 95. Among other things, Taylor interviewed Wood, Wood's father, and several of Wood's sisters, including Johnnie Pearl Wood and Susan Wood Caldwell. *Id.* at 89-91.

Ms. Johnnie Pearl Wood is Wood's oldest sister. *Id.* at 107. She testified that their mother never abused her or her siblings. *Id.* at 111, 129-130. She and her siblings lived with Nellzena, their half-sister, after their mother died. *Id.* at 115. Nellzena punished Wood when he misbehaved by making him "clean the back yard and ... do work outside." *Id.*

3. Facts from the Rule 32 Evidentiary Hearing on Remand

On August 4, 2003, the Rule 32 circuit court held an evidentiary hearing on Wood's claim that his alleged mental retardation renders him ineligible for the death penalty and his claim that his counsel were ineffective for failing to develop and present evidence of his alleged mental retardation at the penalty phase of his trial.

Ms. Hilda Maddox testified that she was one of Wood's special education teachers at Luverne High School. (Vol. 28, Court reporter's transcript (8/4/03), pp. 33-34.) She testified that Wood attended class regularly and was "very clean" and "very neat." *Id.* at 44. She recalled that he typically completed his assignments and earned average grades. *Id.* at 36, 43-44.

Ms. Janet Penn also taught Wood at Luverne High School. *Id.* at 51. She testified that Wood was fully capable of following her instructions, that his behavior was appropriate, and that he fit in with the other students in her class. *Id.* at 59-60.

Mr. Melvin Wright testified that he is currently employed as the casting supervisor at the Sanders Lead Company in Troy. *Id.* at 62. He testified that he hired Wood to work at that company in the early-1980's, and he recalled that Wood worked there for a year and a half or two years. *Id.* at 62-63, 65. He testified that Wood was trained to pan, draw, and stack lead and to operate the machinery and equipment, including a forklift. *Id.* at 63, 70. He described their work environment as "hazardous," and he explained that Wood could have had his "arm broken or cut off or anything" if he was not alert and paying attention to his work. *Id.* at 69. He testified that Wood was dependable and hard-working, and he characterized Wood as an "employee who did his job, came to work on time when he was scheduled to come, and got along with everyone." *Id.* at 64-65.

Dr. Karen Salekin, a clinical psychologist, testified that she was retained by Wood's counsel to determine whether he is mentally retarded. *Id.* at 78-80. To assess Wood's adaptive functioning, Dr. Salekin administered the American Association on Mental Retardation Adaptive Functioning Scales ("AAMR test") to Johnnie Pearl Wood. *Id.* at 97. On cross-examination, she agreed that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, (DSM-IV) states that examiners should obtain information from multiple reliable sources in assessing a subject's adaptive functioning. *Id.* at 119. She testified, however, that Johnnie Pearl Wood was "the only reliable independent source" that she could find to ask about Wood's adaptive functioning. *Id.* Dr. Salekin also conceded that she "only had minimal information" about Wood's employment history. *Id.* at 113. Her overall conclusion was that Wood is mildly mentally retarded. *Id.* at 104

Ms. Barbara Siler testified that she dated Wood for approximately three years. *Id.* at 139. During that time period, she lived with her mother in Troy, and Wood lived in Luverne. *Id.* at

140. Wood drove to Troy to visit her on weekends and sometimes during the week. *Id.* She recalled three of his automobiles and testified that he "kept his cars detailed" and was very proud of them. *Id.* at 142. She testified that Wood's appearance always was nice and that he cared very much about his hair and how he dressed. *Id.* at 141. Wood was working as a delivery truck driver for Coca Cola when she met him, and she recalled that he also worked for a funeral home company and for the Sanders Lead Company. *Id.* at 141-142. During their relationship, Wood always had money, and he was the one who would go into the lobby to obtain a room for them when they stayed at motels. *Id.* at 142-144. Siler testified that she was able to read and understand his letters to her, which were written in cursive handwriting. *Id.* at 149.

After dating Wood for about a year and a half, Siler decided to end their relationship because he was abusive and had a bad temper. *Id.* at 144-146. When Wood learned that she intended to end their relationship, he drove to her mother's house to confront her. *Id.* at 147. Wood sent a friend to the door of her mother's house to tell her to come outside because he knew that her mother would not allow him to enter the house. *Id.* at 147-148. Siler answered the door and told his friend that she would not come outside. *Id.* at 148. Later that evening, Siler was sitting on a couch in her mother's home when she noticed that Wood was standing at a window, pointing a gun at her. *Id.* As she jumped up, Wood shot her. *Id.* at 148-149.

Dr. Harry McClaren, a clinical and forensic psychologist, testified that he was retained by the State to determine whether Wood is mentally retarded. *Id.* at 156. Unlike Dr. Salekin, Dr. McClaren and his associate, Dr. Gregory Prichard, assessed Wood's adaptive functioning by interviewing a large number of people who know or knew him, including his sisters, former school teachers, former work supervisor, corrections officers, and a friend of the family. *Id.* at 170-171, 177. In addition, they administered an adaptive functioning test – either the Scales of

Independent Behavior, Revised Edition, ("SIB-R test") or the Vineland Adaptive Behavior Scales ("Vineland test") – to most of those individuals. *Id.* at 167, 187. When he was asked why he and Dr. Prichard interviewed so many people and administered so many adaptive functioning tests, Dr. McClaren stated that, "it's better to interview as many people as you can that know the person well because different people will see different parts of a person's behavior." *Id.* at 171.

Based on his interview of Wood and the various individuals who know Wood, his review of the results of the tests that he and Dr. Prichard administered, and his review of various records, Dr. McClaren concluded that Wood does not have significant deficits in adaptive functioning and that Wood "functions at a higher level than a mentally retarded person." *Id.* at 184-186. Accordingly, Dr. McClaren testified that Wood is not mentally retarded. *Id.*

Dr. Prichard, a clinical and forensic psychologist, testified that there are three accepted instruments for assessing adaptive functioning – the Vineland test, the SIB-R test, and the AAMR test. (Vol. 29, Court reporter's transcript (8/4/03), p. 216.) Those tests are administered to individuals who know the subject well enough to provide an estimate of his or her adaptive functioning. Dr. Prichard explained that the mean score on the those tests is 100 and that a score of 70 or below indicates that the subject might be mentally retarded. *Id.* at 226.

Dr. Prichard testified that they administered the Vineland test to Hilda Maddox, Janet Penn, Barbara Siler, Maeola Wood, and Johnnie Pearl Wood. *Id.* at 223. Maddox's responses generated a score of 68 on the Vineland test, and Penn's responses generated a score of 77. (Vol. 29, Clerk's record, pp. 17, 33.) Siler's responses generated a score of 68. (Vol. 29, Court reporter's transcript (8/4/03), p. 227.) Dr. Prichard testified that Siler likely underestimated Wood's communication and socialization skills because of the abuse that she suffered at his hands. *Id.* at 228.

Drs. McClaren and Prichard also administered the SIB-R to three Alabama corrections officers – Officers Ryans, Cargill, and Witherspoon. (Vol. 28, Court reporter's transcript (8/4/03), p. 177.) Ryans's responses generated a score in the 90's. *Id.* at 178. Cargill's responses generated a score of 103, and Witherspoon's responses generated a score of 117. (Vol. 29, Court reporter's transcript, p. 229.) Dr. Prichard testified that it was important to obtain scores from those officers because they know and interact with Wood at the present time and can, therefore, speak to his present adaptive functioning, unlike Hilda Maddox and Janet Penn who have not interacted with him in decades. *Id.* at 230.

Johnnie Pearl Wood's responses generated a score of 41 on the Vineland test, and Maeola Wood's responses generated a score of 55 on that test. *Id.* at 224, 226. Dr. Prichard testified that a score of 41 would mean that Wood requires "constant to frequent supervision" and is functioning at the level of a five or six year old. *Id.* at 224. He also explained that a score of 55 would mean that Wood needs "a lot of supervision to just do the normal things, normal simple things." *Id.* at 226. When he was asked whether their assessment of his adaptive functioning is consistent with his observations of Wood and the other information that he learned about Wood, Dr. Prichard testified as follows:

> It's absolutely not consistent with operating a front-end loader, with driving your own car and maintaining your own cars, with taking trips to Florida, with catching a bus going to Florida, with managing your own money, with taking absolutely wonderful care of his clothes according to everybody, his hair, his fingernails, maintaining a relationship with a woman for three and a half years where he had to travel from Luverne to Troy, purchasing motel rooms, to do that, earning a living and doing pretty darn well, I would say that all of those things you have to pay attention to. And is that kind of history consistent with mental retardation? Certainly not in my experience.

Id. at 233. He further testified that, "as I progressed into my assessment, it became extremely apparent that [their scores] were not consistent with his functioning in the community." *Id.*

Dr. Prichard found that Wood's adaptive functioning skills are sufficient for independent functioning, testifying that Wood "functioned independently by and large from the age of sixteen or seventeen on; personal and social sufficiency, independent functioning in virtually every area of his life, [with] nobody holding his hand to do things." *Id.* at 233-234. Dr. Prichard concluded that Wood's adaptive functioning skills "are probably on the borderline – high borderline range, potentially in some areas even average." *Id.* at 234. For that reason, Dr. Prichard agreed with Dr. McClaren that Wood is not mentally retarded. *Id.* at 233-234.

REASONS FOR DENYING THE PETITION

It is worth noting at the outset that Wood does not allege – let alone prove – any traditional ground for certiorari. Wood does not, for instance, argue that the Eleventh Circuit's decision below conflicts with the decisions of other courts of appeal, *see*, Sup. Ct. R. 10(a), or that this case presents a novel and important question of federal law, *see*, Sup. Ct. R. 10(c). At bottom, Wood requests that this Court engage in a fact-bound review of his particular case. This Court should deny his petition for writ of certiorari.

I. This Court Should Decline To Review Wood's Splitless And Meritless Claim That His Counsel's Failure To Investigate And Present Evidence Of His Low Intelligence At The Penalty Phase Of His Trial Constitutes Ineffective Assistance.

Wood contends that his trial counsel were ineffective for failing to adequately investigate and present evidence of his low intelligence at the penalty phase of his trial. Wood further alleges that he was prejudiced by his counsel's failure to present such evidence to the jury. Certiorari should be denied as to this claim for at least two reasons.

A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of This Court's Review

Wood's claim is simply a request for this Court to review the fact-bound determination of the Eleventh Circuit. Wood does not assert that there is a split in the circuits regarding his

ineffective assistance of counsel claim or that this case presents a novel and important question of federal law. Instead, Wood is asking this Court for nothing more that a review of the factual determination of the Eleventh Circuit. As Supreme Court Rule 10 states, "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Because Wood has failed to articulate a "compelling reason" under Rule 10 for this Court to grant certiorari to review this claim, this Court should deny the writ.

B. Certiorari Should Be Denied Because The Claim Is Without Merit.

Wood's claim that his counsel were ineffective for failing to adequately investigate and present evidence of his low intelligence at the penalty phase of his trial was raised in the state post-conviction proceedings and was rejected by both the Rule 32 circuit court and the Alabama Court of Criminal Appeals. (Vol. 41, Clerk's record, pp. 2425-2446.) See Resp. App. at 36- 57.[2] *Wood*, 891 So. 2d at 411-413. Here, there is no dispute that the state courts, in reaching that decision, applied the proper rule of law – *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) – to the facts of his claim and that the Eleventh Circuit applied the correct rule of law – the Anti-Terrorism and Effective Death Penalty Act (AEDPA) – in reviewing the state courts' decision.

To obtain relief on his claim, Wood must show that the Rule 32 circuit court's decision, which was adopted by the Alabama Court of Criminal Appeals, is contrary to or involves an unreasonable application of federal law as determined by this Court or that the decision is based

[2] Because Wood deleted eight pages of the Rule 32 circuit court's 2003 opinion before he filed that opinion with this Court as Petitioner's Appendix E, Respondents will refer to their appendix, which contains the Rule 32 circuit court's 2003 opinion in its entirety, in addressing that opinion. When citing to the Rule 32 circuit court's 2003 opinion, Respondents will refer to the page numbers that are located on the bottom right-hand side of the opinion.

on an unreasonable determination of the facts that were presented during the state court proceedings. 28 U.S.C. § 2254(d)(1) and (2). In determining that Wood failed to satisfy his burden of proving ineffective assistance of counsel, the Rule 32 circuit court made findings of fact, which are presumed correct unless they are rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The state court's credibility determinations constitute factual findings that are presumed correct. *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000). As the Eleventh Circuit correctly found, Wood has failed to satisfy his burden of proof. *Wood*, 542 F.3d at 1302-1314. See Pet. App. A at 14a-72a.

1. The Eleventh Circuit's Application Of The Performance Prong Was Straightforward And Does Not Conflict With Any Decision Of This Court.

Wood contends that his counsel's performance was deficient because they failed to present the evidence that was in their possession regarding his low intelligence at the penalty phase of his trial and because they failed to further investigate his low intelligence. Pet. at 18-25. Wood is mistaken. This Court should decline to review this claim because the Eleventh Circuit correctly held that Wood failed to satisfy his burden of proving that the state courts' decision finding that his counsel were not deficient in those regards was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts that were presented during the state court proceedings.

On September 24, 2003, the Rule 32 circuit court denied relief on this claim. (Vol. 41, Clerk's record, pp. 2425-2446.) See Resp. App. at 36-57. In holding that Wood's counsel were not deficient for failing to present evidence regarding his low intelligence or for failing to further investigate his intelligence, the court found as follows:

> On this record, this Court finds that Wood has failed to establish deficient performance with respect to this claim. His counsel thoroughly reviewed Dr.

> Kirkland's report and determined that nothing in that report merited further investigation. Based on their investigation and the detailed information that they had in their possession, Wood's counsel made a reasonable judgment that another mental evaluation was not necessary. Because "[e]very counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial," this Court recognizes that "counsel does not enjoy the benefit of unlimited time and resources." *Chandler*, 218 F.3d at 1314 n.14.[3] This Court finds that reasonable counsel could have decided against seeking another mental health evaluation, in order to prepare other, more promising, defenses for trial.
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> Moreover, it appears that Wood's trial counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest. Wood did not, however, ask Mr. Dozier, Mr. Ralph, or Mr. Trotter about this matter. The record is, therefore, silent as to why they did not call Dr. Kirkland as a witness. A silent record creates a presumption that trial counsel exercised sound professional judgment. *Chandler*, 218 F.3d at 1314 n.15. In addition, Wood had the burden of proving that the failure to call Dr. Kirkland was unreasonable. Ala. R. Crim. P. 32.3. Despite this burden, Wood did not call Dr. Kirkland as a witness at any of his Rule 32 evidentiary hearings or present any other testimony concerning this matter.
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> Because their decision was based on a thorough review of Dr. Kirkland's report, the failure of Wood's counsel to "create" a mental retardation issue at his capital murder trial is understandable and reasonable. Moreover, as noted in this Court's original Final Order, Mr. Dozier and Mr. Ralph were very experienced attorneys, and their decision not to raise a mental retardation issue at Wood's trial is, therefore, due great deference. For all of these reasons, Wood cannot establish deficient performance with respect to this claim.

Id. at 2440-2442. See Resp. App. at 51-53. As the Eleventh Circuit correctly found, the state courts' findings of fact were "amply" supported by the evidence. *Wood*, 542 F.3d at 1302-1309. See Pet. App. A at 46a-61a. The state courts' adjudication of this claim was, therefore, in no way an unreasonable application of federal law under *Strickland* or an unreasonable determination of the facts that were presented in state court.

Wood's trial counsel – Cary Dozier, Frank Ralph, and Kenneth Trotter – conducted a reasonable penalty phase investigation and obtained a wealth of evidence that they presented on

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[3] *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (*en banc*).

his behalf at the penalty phase of his trial. Although they did not present any evidence regarding his low intelligence, Wood's counsel were well aware that his intelligence is impaired, and they made a reasonable strategic decision not to present that evidence. In particular, his counsel moved the trial court to order a psychological evaluation of Wood, and the court granted their request. (Vol. 7, Clerk's record, pp. 216-218, 234-238.) Dr. Kirkland, a psychologist, evaluated Wood and prepared a thorough expert report summarizing his findings. *Id.* at 240-246. In his report, Dr. Kirkland concluded, among other things, that Wood "is functioning, at most, in the borderline range of intellectual functioning." *Id.* at 243.

Moreover, Wood's counsel consulted with Dr. Kirkland on multiple occasions about his findings. Dozier testified that they had "a lot of correspondence" with Dr. Kirkland, and he further testified that he and his co-counsel reviewed Dr. Kirkland's report and followed up on the information contained in that report. (Vol. 16, Court reporter's transcript (9/18/00), pp. 16, 31.) Dr. Kirkland's report confirms that he spoke with Dozier about his evaluation of Wood. (Vol. 7, Clerk's record, p. 241.) Ralph also testified that he spent time reviewing Dr. Kirkland's report. (Vol. 16, Court reporter's transcript (9/18/00), pp. 115-116.) Likewise, Trotter testified that he reviewed Dr. Kirkland's report, and he recalled that he and Dr. Kirkland talked about the report on May 10, 1994. (Vol. 17, Court reporter's transcript (8/22/01), pp. 18-20.) Thus, Wood's counsel investigated and obtained evidence about his intellectual functioning, and as a result of their investigation, they were well aware of Dr. Kirkland's finding regarding his low intelligence.

Wood misrepresents his counsel's testimony at the hearing on his Rule 32 petition and disregards the evidence in the record that supports the state courts' finding that they conducted a thorough penalty phase investigation. In light of Wood's misrepresentations, Respondents will highlight the actions that his counsel took in conducting their penalty phase investigation.

Wood alleges that Dozier and Ralph did not participate in "any investigation for the penalty phase" and, instead, left Trotter to investigate and prepare for the penalty phase of Wood's trial "on his own." Pet. at 3-4. Nothing could be further from the truth. When he was asked whether he and Ralph participated in investigating and preparing for the penalty phase of the trial, Dozier responded, "Of course, we participated." (Vol. 16, Court reporter's transcript (9/18/00), p. 15.) When he was asked whether Trotter handled the penalty phase, Dozier responded, "Some of it. Not all of it." *Id.* Dozier testified that each of the attorneys participated in the investigation, preparation, and presentation of Wood's penalty phase defense, and he denied that Trotter was placed "in charge" of the penalty phase. *Id.* at 16, 53. With regard to his own preparation for the penalty phase, Dozier testified that he obtained information from Wood, interviewed several witnesses, including Wood's father, and asked Pete Taylor to search for evidence that they could use at the penalty phase of the trial. *Id.* at 16, 54-56. Dozier also reviewed Dr. Kirkland's report and consulted with him about his findings. *Id.* at 31, 54.

Ralph participated in the investigation and preparation of the penalty phase as well. *Id.* at 99. In fact, when he was asked whether it is fair to say that he "had no involvement in the preparation for or investigation of the penalty phase," Ralph responded, "Well, I don't think that's entirely correct." *Id.* With regard to his own preparation for the penalty phase of Wood's trial, Ralph recalled that he interviewed two of Wood's sisters or one of his sisters and his father. *Id.* at 100. In addition, Ralph studied Dr. Kirkland's report and reviewed the reports that were prepared by their investigator, Pete Taylor. *Id.* at 92, 104.

Wood also disparages Trotter's investigation and preparation for the penalty phase of the trial by falsely alleging that his "investigation consisted of little more than interviews with [his] family at the courthouse the day before the sentencing hearing[.]" Pet. at 24. On June 28, 1994,

Trotter called Susan Wood, one of Wood's sisters, and spoke with her for about thirty minutes. (Vol. 17, Court reporter's transcript (8/22/01), p. 21; Clerk's record, p. 9.) Even assuming that his call to Susan Wood was the first time that he contacted one of Wood's family members, Trotter's first contact with Wood's family occurred over three months before his trial, not during the recess between the guilt and penalty phases of his trial.

Trotter went to great lengths to obtain mitigation evidence and prepare for the penalty phase of Wood's trial. Trotter obtained useful information from Wood and their investigator, Pete Taylor. (Vol. 17, Court reporter's transcript (8/22/01), pp. 16-17.) In addition, Trotter interviewed potential penalty phase witnesses, including members of Wood's family. *Id.* at 36. With regard to that aspect of his mitigation investigation, Trotter testified as follows: "I know that there were a number of occasions that Holly would be brought to the courthouse and his family would be here. And on some of those occasions ... I interviewed the family." *Id.* at 36-37. Trotter specifically asked Wood's family members about "Holly's upbringing, background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything that we could use to humanize Holly to make him seem more real to the jury." *Id.* at 37. Trotter asked them for information about his family's "living conditions and circumstances," and he questioned them about the death of Wood's brother, Samuel. *Id.* at 38.

He also spoke with officials at Luverne High School in an effort "to get information about what kind of student Holly had been, anything that might be helpful to the defense." (Vol. 17, Court reporter's transcript (8/22/01), p. 23.) Trotter asked them to provide him with Wood's academic records, and when they failed to respond to his request, Trotter went so far as to issue a subpoena for the records. *Id.* Trotter never received the records, however, because the school was unable to comply with his subpoena. *Id.* Likewise, Wood's Rule 32 counsel attempted

to obtain Wood's academic records from Luverne High School but were informed by school officials that his records has been lost or destroyed. *Wood*, 542 F.3d at 1293, n.14. See Pet. App. A at 25a ("No academic or other records from Wood's high school days were even produced at the Rule 32 hearings.")

Wood's Rule 32 counsel called all three of his trial counsel at the first Rule 32 evidentiary hearing but inexplicably failed to ask them why they decided not to present evidence of his low intelligence at his trial. Likewise, his counsel were not asked why they decided not to call Dr. Kirkland as a witness or introduce his report into evidence at the penalty phase of his trial. For that reason, the record is silent as to their reasons for choosing not to present that evidence. There is a strong presumption that counsel's performance was within the "wide range of reasonable professional assistance." *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001). "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] 'where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment.'" *Chandler*, 218 F.3d at 1315, n.15. Because the record is silent as to his trial counsel's reasons for deciding against presenting evidence of his low intelligence, the state courts' were correct in presuming that they acted reasonably in making that decision.

Although Wood's trial counsel were not asked about and did not testify as to their reasons for not presenting evidence about his low intelligence at the penalty phase of his trial, a fair reading of the record suggests that such evidence would have been inconsistent with and would have undermined the testimony of three of the witnesses whom they called at that phase of his trial. The record reflects that Wood's counsel's primary penalty phase strategy was to humanize him by emphasizing his important role in his family and by showing the jury that his

family members would be devastated if he was sentenced to death. To that end, they called Wood's father and two of his sisters, each of whom expressed their love for Wood and testified as to his important role in their family. (Vol. 6, Court reporter's transcript, pp. 1001-1046.)

Johnnie Pearl Wood, in particular, testified at length about the death of their mother, their life with various caretakers, and the problems that she and her siblings faced after the death of their mother, including constant poverty and the tragic death of their brother, Samuel. *Id.* at 1003-1015. She further testified about Wood's role in their family, explaining to the jury that he did everything that he could to take care of her and their siblings, including dropping out of school so that he could take a job to earn money to support the family and buying a car, pursuant to an installment purchase agreement, so that he could provide their family with a means of transportation. *Id.* at 1009-1010, 1014-1015. She testified that Wood was the "leader" in their home, and she went so far as to testify that, "if it hadn't been for him ... providing for us, I don't know where we would have been at." *Id.* In short, the picture that emerged from Johnnie Pearl's testimony was that their family was very poor and faced one tragedy after another – their mother and brother dying, constantly being moved from one home to another, and their father's inability to assist them financially because he had another family to support – but they survived as a family and persevered because of Wood's leadership. *Id.*

Although their primary penalty phase strategy was to humanize Wood by presenting evidence to show the jurors how important he is to his family and by focusing their attention on the impact that a death sentence would have on his family, his counsel also decided to present evidence showing that he was using alcohol on the day of the crime. To that end, his counsel called Ms. Diane Boutwell, an employee of the Alabama Board of Pardons and Paroles, as their fourth witness at the penalty phase of the trial. *Id.* at 1037-1046. She testified that the Alabama

Uniform Arrest Report that was prepared after Wood's arrest for the murder of Ruby Gosha reflects that his condition at the time of arrest was noted as "drinking," indicating that he was perceived by the arresting officers to have been drinking alcohol before his arrest. *Id.* at 1043. At the request of Wood's counsel, the report was admitted into evidence. *Id.* at 1040.

Despite Wood's contentions to the contrary, the compelling testimony of his family members would have been severely undermined if his trial counsel had then presented evidence of his low intelligence. As the Eleventh Circuit correctly found, such evidence, at a minimum, would have caused the jurors to question the veracity of Johnnie Pearl Wood's testimony that Wood was the leader in their home who did everything that he could to take care of her and their siblings, including dropping out of school at the young age of fifteen so that he could take a job to earn money to support the family and buying a car, pursuant to an installment purchase plan, so that he could provide the family with a means of transportation. *Wood*, 542 F.3d at 1306. See Pet. App. A at 53a ("Additionally, presenting evidence of Wood's mental deficiencies, special education classes, and third-grade reading level might have suggested Wood left school for those reasons and not only because he had to work and support his five sisters financially."). His counsel's decision not to present that evidence was, therefore, reasonable and strategic.

The record further reflects that Wood's trial counsel made a reasonable and strategic decision not to call Dr. Kirkland as a witness or introduce his report into evidence. Presumably, they made that decision, at least in part, because Dr. Kirkland twice stated in his report that Wood denied using alcohol on the day of the crime, noting that he "denies using any alcohol or drugs on the day of the offense" and that he "was quite willing to discuss the lack of drugs or alcohol on the day of the offense." (Vol. 7, Clerk's record, pp. 242, 245.) Because Wood told Dr. Kirkland that he did not consume alcohol on the day of the crime, his counsel would have

fatally undermined their argument that the jury should consider the evidence of his alcohol use on the day of the crime if they had introduced Dr. Kirkland's report into evidence. Likewise, if they had called Dr. Kirkland as a witness, there can be no doubt that the prosecutor would have asked him on cross-examination whether Wood denied using alcohol on the day of the crime. Thus, Wood's counsel made a reasonable and strategic decision not to call Dr. Kirkland as a witness or introduce his report into evidence at the penalty phase of his trial to prevent the prosecution from eliciting Wood's harmful statement to Dr. Kirkland.

Dr. Kirkland's report contains other information that would have been harmful to Wood. In particular, Dr. Kirkland's report states that Wood was arrested seventeen times between 1981 and 1984 and lists each offense for which he was arrested. (Vol. 7, Clerk's record, p. 242.) Dr. Kirkland also devoted a paragraph in his report to Wood's 1984 assault conviction, noting that Wood shot his ex-girlfriend, Barbara Siler, "through the window of her apartment after seeing her with another man" and that he was sentenced to fifteen years in prison after being convicted of that offense. *Id.* Although Wood's counsel could have moved for the admission of portions of Dr. Kirkland's report, there can be no question that the prosecutor would have moved that the entire report be admitted into evidence. Plainly, as the Eleventh Circuit found, Wood's counsel made the reasonable and strategic decision not to call Dr. Kirkland as a witness or introduce his report, or portions thereof, into evidence at the penalty phase of his trial to prevent the prosecutor from eliciting information that would have been harmful to him. *Wood*, 542 F.3d at 1305-1306. See Pet. App. A at 52a-53a.

As the Eleventh Circuit correctly held, Wood has failed to satisfy his burden of proving that the state courts' decision that his counsel were not deficient for failing to introduce evidence of his low intelligence or for failing to obtain additional information to confirm what they

already knew well – that Wood's intellectual functioning is impaired – is contrary to or involves an unreasonable application of federal law as determined by this Court or that the decision is based on an unreasonable determination of the facts that were presented during the state court proceedings. *Wood*, 542 F.3d at 1302-1309. See Pet. App. A at 46a-61a. This Court should, therefore, deny the writ.

2. The Eleventh Circuit's Application Of The Prejudice Prong Was Straightforward And Does Not Conflict With Any Decision Of This Court.

Wood contends that he was prejudiced by his counsel's failure to present evidence of his low intelligence at the penalty phase of his trial. Pet. at 25-27. He is mistaken.

In particular, Wood alleges that he was prejudiced by his counsel's failure to present evidence of his low intelligence because he contends that such evidence is inherently mitigating. Wood fails to recognize, however, that his counsel would have enabled the prosecution to present harmful rebuttal evidence "that would have tipped the scales even more toward a death sentence" if they had presented evidence of his low intelligence. *Wood*, 542 F.3d at 1311. See Pet. App. A at 64a. If his counsel had called Dr. Kirkland or attempted to admit portions of his report into evidence, they would have opened the door for the prosecution to elicit harmful evidence, including Wood's statement to Dr. Kirkland that he did not consume alcohol on the day of the crime, information about his extensive arrest record and 1984 assault conviction for shooting Siler, and evidence reflecting that he "was highly functional, had full appreciation for the criminality of his conduct, and was indeed morally culpable." *Wood*, 542 F.3d at 1312. See Pet. App. A at 66a. Because his counsel would have opened the door for the presentation of harmful evidence if they had presented evidence of his low intelligence, Wood cannot satisfy his

burden of proving that the state courts' decision was an unreasonable application of federal law under *Strickland* or an unreasonable determination of the facts.

Moreover, in sentencing Wood to death, the trial court found the existence of three aggravating circumstances: (1) the capital offense was committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of a felony involving the use of violence to the person; and, (3) the capital offense was committed while the defendant was engaged in the commission of or an attempt to commit or flight after committing burglary in the first degree. (Vol. 12, Clerk's record, pp. 1008-1009.) The court held that the three aggravating circumstances "far outweigh" the mitigating circumstances and concluded that the "aggravating circumstances outweigh the mitigating circumstances in all regards and that they are sufficient in both quantity and quality to more than uphold the jury's verdict recommending death in this case." *Id.* at 1010.

In light of the brutal nature of his crime and the specific findings of the court that sentenced him to death, the state courts' finding that there is no reasonable probability that the presentation of evidence regarding Wood's low intelligence, including the evidence that was presented during his Rule 32 proceeding, would have altered the balance of the aggravating and mitigating circumstances that led to the imposition of the death penalty was in no way an unreasonable application of federal law under *Strickland* or an unreasonable determination of the facts that were presented in state court. Evidence of Wood's low intelligence would not have altered, diminished, or undermined the three aggravating circumstances. Likewise, such evidence would not have refuted or called into question the facts surrounding the crime. Again, Wood brutally murdered Ruby Gosha while she was asleep in her bed in her mother's house and then callously bragged about the crime to his cousin, Calvin Salter, telling him that, "I shot that

bitch in the head and blowed [sic] her brains out and all she did was wiggle." (Vol. 3, Court reporter's transcript, p. 495.) This Court should, therefore, deny the writ.

II. This Court Should Decline To Review Wood's Claim That The Eleventh Circuit Misapplied 28 U.S.C. § 2254(d)(2) And 28 U.S.C. § 2254(e)(1) In Denying Relief On His Claim Of Ineffective Assistance Of Counsel ("IAC") Because That Claim Was Not Raised Below, Is Unworthy Of Certiorari Review, And Is Meritless.

Wood contends that this Court should grant certiorari to resolve an alleged circuit split regarding the interplay between 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1), and he further asserts that the Eleventh Circuit misapplied those statutes in denying relief on his IAC claim. Certiorari should be denied as to this claim for at least three reasons.

A. Certiorari Should Be Denied Because This Claim Was Not Raised In Or Addressed By The Lower Court.

Wood did not argue in his rehearing brief to the Eleventh Circuit that its opinion was erroneous because the court somehow misapplied 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1) in resolving his IAC claim. In fact, Wood did not once cite either of those statutes in his rehearing brief. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646, 112 S. Ct. 1644, 1649 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this claim.

B. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of This Court's Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye v. Noia*, 372 U.S. 391, 436, 83 S. Ct. 822, 847 (1963); Rule 10, Rules of the Supreme Court of the United States. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Wood has not alleged compelling grounds for this Court to

grant certiorari review of this claim. Moreover, the instant claim involves a simple application of established precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration. This Court should, therefore, deny the writ as to this claim.

C. Certiorari Should Be Denied Because The Claim Is Without Merit

Although his claim is cryptic in nature, Wood appears to be arguing that the Eleventh Circuit somehow misapplied 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1) in resolving his IAC claim. Because the Eleventh Circuit properly applied the provisions of the AEDPA in analyzing his IAC claim, Wood's claim is without merit.

In *Miller-El v. Cockrell*, 537 U.S. 322, 341, 123 S. Ct. 1029, 1042 (2003), this Court held that the "AEDPA does not require [a] petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." Instead, this Court explained that "[t]he clear and convincing evidence standard is found in § 2254(e)(1), but that sub-section pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief[.]" *Id.* at 341-342, 123 S. Ct. at 1042. This Court added that, "to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply." *Id. See also Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S. Ct. 2317, 2325 (2005) (" Miller-El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the "presumption of correctness by clear and convincing evidence."). Thus, habeas petitioners are not required to prove that a state court's

decision is objectively unreasonable by clear and convincing evidence, but they do bear the burden of rebutting state court *findings of fact* by clear and convincing evidence.

In an apparent attempt to create a controversy, Wood suggests that the Eleventh Circuit erred in noting that he failed to present "evidence, much less clear and convincing evidence, that counsel did not make such decisions about Dr. Kirkland's report and a mental health defense" in holding that *the state courts' decision* that his counsel were not deficient for deciding against presenting evidence of his low intelligence – either through Dr. Kirkland, his report, or other evidence – was not based on an unreasonable determination of the facts that were presented in state court. *Wood*, 542 F.3d at 1281, n.23. See Pet. App. A at 50a. Wood, however, fails to recognize that the Eleventh Circuit, in that footnote, did not cite 28 U.S.C. § 2254(e)(1) or hold that he was required to show by clear and convincing evidence that his counsel did not make a decision against presenting evidence of his low intelligence. *Id.* Instead, the court simply made the observation, which is amply supported by the record, that he failed to present any evidence to show that his counsel did not make a decision against presenting such evidence. *Id.*

Moreover, assuming, *arguendo*, that the footnote in question is interpreted as a holding by the Eleventh Circuit that Wood failed to satisfy his burden of rebutting *the state courts' finding of fact* that his counsel made a decision not to present evidence of his low intelligence, that holding would be entirely consistent with 28 U.S.C. § 2254(e)(1), which provides that state court findings of fact are presumed correct unless rebutted by clear and convincing evidence. Either way, the Eleventh Circuit correctly applied the AEDPA, as interpreted by this Court, in resolving Wood's IAC claim. This Court should, therefore, deny the writ.

III. This Court Should Decline To Review Wood's Splitless And Meritless Claim That The Eleventh Circuit Improperly Rejected His *Atkins* Claim.

Wood contends that the Eleventh Circuit erred in concluding that he failed to satisfy his burden of proving that the state courts' decision that he is not mentally retarded is contrary to or involves an unreasonable application of federal law as determined by this Court or that the decision is based on an unreasonable determination of the facts that were presented during the state court proceedings. Certiorari should be denied as to this claim for at least two reasons.

A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of This Court's Review.

Wood's claim is simply a request for this Court to review the fact-bound determination of the Eleventh Circuit. Wood does not assert that there is a split in the circuits regarding his claim that he is mentally retarded and, therefore, ineligible for the death penalty pursuant to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), or that this case presents a novel and important question of federal law. Instead, Wood is asking this Court for nothing more that a review of the factual determination of the Eleventh Circuit. As Supreme Court Rule 10 states, "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Because Wood has failed to articulate a "compelling reason" under Rule 10 for this Court to grant certiorari to review this claim, this Court should deny the writ.

B. Certiorari Should Be Denied Because The Claim Is Without Merit.

Wood's *Atkins* claim was raised in the state post-conviction proceedings and was rejected by both the Rule 32 circuit court and the Alabama Court of Criminal Appeals. (Vol. 41, Clerk's record, pp. 2390-2425.) See Resp. App. at 1-36. *Wood*, 891 So. 2d at 411-413. Here, there is no dispute that the state courts, in reaching that result, applied the proper rule of law – *Atkins v.*

Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002) – to the facts of his claim and that the Eleventh Circuit applied the correct rule of law – the AEDPA – in reviewing the state courts' decision. To obtain relief on his claim, Wood must show that the state courts' decision is contrary to or involves an unreasonable application of federal law as determined by this Court or that the decision is based on an unreasonable determination of the facts that were presented during the state court proceedings. 28 U.S.C. § 2254(d)(1) and (2). As the Eleventh Circuit correctly found, that he cannot do. *Wood*, 542 F.3d at 1285-1288. See Pet. App. A at 7a-14a.

In *Atkins*, 536 U.S. at 321, 122 S. Ct. at 2252, this Court held that the execution of mentally retarded capital offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. Instead of creating a national standard that courts should apply in determining whether a capital offender is mentally retarded, this Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317, 122 S. Ct. at 2250. This Court did, however, observe that the States that barred the execution of said offenders prior to the Court's decision in *Atkins* had enacted statues that "generally conform to the clinical definitions" of mental retardation that have been promulgated by the American Association on Mental Retardation (AAMR)[4] and the American Psychiatric Association (APA). *Id.* at 317, n.22, 122 S. Ct. at 2250, n.22.

The AAMR's most recent definition of mental retardation[5] provides as follows: "Intellectual disability is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills."

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[4] The members of the American Association on Mental Retardation re-named their organization the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2007. To avoid confusion, Respondents will refer to that organization as the AAMR.

[5] The AAMR recently decreed that the term, "mental retardation," should be replaced by the term, "intellectual disability." *See http://www.aamr.org/content_104.cfm?navID=22.*

See http://www.aamr.org/content_100.cfm?navID=21 (last visited on April 8, 2009). That definition further provides that "[t]his disability originates before the age of 18." *Id.*

In *Ex parte Perkins*, 851 So. 2d 453, 455-456 (Ala. 2002), the Supreme Court of Alabama set forth the following standard for reviewing an *Atkins* claim: "[T]o be considered mentally retarded, [a defendant] must have significantly sub-average intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e. before the defendant reached age 18)." *Id.* at 456. Thus, Alabama courts apply the broad definition of mental retardation highlighted in *Atkins* – significantly sub-average general intellectual functioning accompanied by significant deficits in adaptive functioning, both of which must have manifested before the age of eighteen – in reviewing *Atkins* claims. Here, the state courts correctly applied that definition in finding that Wood failed to satisfy his burden of proving that he is mentally retarded. *Wood*, 542 F.3d at 1286. See Pet. App. A at 7a-8a.

Wood, however, contends that the state courts erroneously "focused on what [he] could do rather than whether he had limitations in adaptive functioning" in concluding that he is not mentally retarded because he does not have significant deficits in adaptive functioning. Pet. at 30. He is mistaken. The state courts reviewed the wealth of evidence pertaining to his adaptive functioning that was presented during the state court proceedings in its totality and correctly found that the evidence demonstrates conclusively that he does not have significant deficits in adaptive functioning. In reaching that result, the state courts properly credited the testimony of two psychologists, Dr. Harry McClaren and Dr. Gregory Prichard, who concluded that Wood functions adaptively at a higher level than that of a mentally retarded person and the testimony of

his former teachers, former employer, and former girlfriend, each of whom attested to his good adaptive functioning skills. *Wood*, 542 F.3d at 1286. See Pet. App. A at 9a.

In denying relief on Wood's *Atkins* claim, the Eleventh Circuit summarized the state courts' findings of fact regarding his adaptive functioning as follows:

> The Rule 32 court found Wood: (1) was able to obtain and maintain employment and had worked at several jobs for a lengthy amount of time, such as driving a forklift, driving motor vehicles, working in a factory, and operating heavy machinery and equipment in a dangerous work environment; (2) was able to function well independently and did not need the assistance of others to complete daily tasks; (3) managed his own money and always had money; (4) did not have problems communicating or getting his needs met verbally or through written language; (5) was able to plan and cook meals for himself and others; (6) could identify and resolve typical problems that might arise in everyday life (such as checking the fuse box if the lights went out in his house); (7) was always neat and clean in his appearance; (8) often drove himself out-of-state to visit relatives and for other reasons, and in fact was an automobile enthusiast who subscribed to Hot Rod magazine; (9) could form and maintain interpersonal relationships with others and had a girlfriend, Barbara Siler, for three years; and (10) devised and implemented a scheme to lure Siler out of her house to shoot her after she ended their relationship.

Wood, 542 F.3d at 1286. See Pet. App. A at 8a-9a. The state courts' findings of fact were based on the testimony of the aforementioned witnesses. *Id.* at 1286-1288. See Pet. App. A at 9a-13a.

Given the wealth of evidence in the record demonstrating that Wood does not have significant deficits in adaptive functioning, the Eleventh Circuit correctly held that the state courts' decision that he is not mentally retarded is not contrary to or an unreasonable application of *Atkins* or based on an unreasonable determination of the facts that were presented during the state court proceedings. This Court should, therefore, deny the writ.

IV. This Court Should Decline To Review Wood's Claim That The Eleventh Circuit Erred In Holding That His *Batson* Claims Are Procedurally Defaulted Because The Underlying Claims Are Unworthy Of Review And Clearly Are Without Merit.

Wood contends that the Eleventh Circuit erred in holding that the claims that he raised in his petition for writ of habeas corpus pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct.

1712 (1986), are procedurally defaulted. Pet. at 32-34. Because Wood's two underlying *Batson* claims are unworthy of review and clearly are without merit, this Court should deny the writ.

A. Certiorari Should Be Denied Because The Underlying Issues Are Not Worthy Of This Court's Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye*, 372 U.S. at 436, 83 S. Ct. at 847; Rule 10, Rules of the Supreme Court of the United States. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Wood has not alleged compelling grounds for this Court to grant certiorari review of his underlying *Batson* claims. Moreover, those claims involve a simple application of established precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration. This Court should, therefore, deny the writ.

B. Certiorari Should Be Denied As To Wood's Meritless Claim That The Prosecutor's Reason For Striking Two Black Jurors Was Pretextual Because The Prosecutor Did Not Strike Similarly Situated White Jurors.

In the district court and the Eleventh Circuit, Wood raised the claim that the prosecutor's explanation that he struck two black jurors – Christine B. Jones and Joe Green – because they were against the death penalty and did not believe in an "eye for an eye" punishment was a pretext designed to mask purposeful discrimination because the prosecutor did not strike five white jurors – David Byrd, Rosa Green, Freddie Jordan, Cary Malden, and Bobby Shackelford – whom, he alleged, also were against the death penalty and did not believe in an "eye for an eye" punishment. Because that claim is refuted by the record, this Court should deny the writ.

On her jury questionnaire form, Ms. Jones stated that she is against the death penalty. (Vol. 10, Clerk's record, p. 771.) During voir dire, Mr. Green repeatedly stated that he is against

the death penalty, and he even went so far as to state that it his belief that it is "wrong" for "people in the military who are shipped overseas" to kill people in a time of war. (Vol. 2, Court reporter's transcript, pp. 251-252.) Unlike Mr. Green and Ms. Jones, white jurors Byrd, Green, Jordan, Malden, and Shackelford each stated on their jury questionnaires and during voir dire that they are not opposed to the death penalty. (Vol. 10, Clerk's record, pp. 671, 731; Vol. 11, Clerk's record, pp. 776, 791, 871.) In fact, Wood challenged Freddie Jordan and Cary Malden for cause because of their support for the death penalty. (Vol. 2, Court reporter's transcript, pp. 264, 266.) Because Wood's assertion that jurors Byrd, Green, Jordan, Malden, and Shackelford were against the death penalty is refuted by the record, this Court should deny the writ.

C. Certiorari Should Be Denied As To Wood's Meritless Claim That The Prosecutor's Reasons For Striking Six Black Jurors Were Pretextual Because The Prosecutor Did Not Strike A Similarly Situated White Juror.

In the district court and the Eleventh Circuit, Wood raised the claim that the prosecutor's reasons for striking six black jurors – George Bowens, Azaline Brooks, Alvin Rodgers, Stanley Scott, Stevie Scott, and Marcus Thomas – were pretextual because the prosecutor did not strike a similarly situated white juror, Frank Dennis Paul. In particular, Wood argued that juror Paul was similarly situated to those black jurors because Paul's aunt was convicted of manslaughter, he expressed a reluctance to serve, and he stated that he did not believe in an "eye for an eye" punishment. This Court should deny the writ because that claim is refuted by the record.

Wood's characterization of juror Paul is not supported by the record. Although he initially stated that he did not want to serve on the jury because he had a job assignment in North Carolina, Paul remained silent when the members of his panel were asked whether any of them would have a problem with the trial lasting a week, even though other jurors (including Alvin Rodgers) stated that they would have trouble serving on the jury if the trial lasted that long.

(Vol. 1, Court reporter's transcript, pp. 111-112; Vol. 2, Court reporter's transcript, pp. 305-306.) Moreover, Paul did not indicate on his jury questionnaire that he did not want to serve on the jury. (Vol. 11, Clerk's record, pp. 812-816.) In addition, he admitted on his jury questionnaire that his aunt was convicted of manslaughter, but he noted that her conviction was for third degree manslaughter. *Id.* at 815. Finally, Paul did not state that he does not believe in an "eye for an eye" punishment. Instead, he stated that whether he believes in that form of punishment "depends on the circumstances." (Vol. 2, Court reporter's transcript, p. 299.)

Unlike juror Paul, jurors Bowens, Brooks, Rodgers, and Thomas made it clear that they did not want to serve on the jury. Bowens told the court that he was a student and could not serve on the jury because he would miss his classes. *Id.* at 208. Similarly, Thomas told the court that he was a student and could not serve on the jury because he would miss tests that were scheduled for the week of the trial. *Id.* at 348-349. Rodgers told the court that he did not want to serve on the jury, stating, "I need to be at work because I got child support to pay." *Id.* at 306. Finally, Brooks told the court that she did not want to serve on the jury because she would miss a dental appointment. (Vol. 1, Court reporter's transcript, p. 103.) Thus, those jurors clearly are distinguishable from juror Paul because each of them was insistent that they could not serve on the jury, unlike Paul, who was not.

In addition, Stanley Scott and Stevie Scott are distinguishable from juror Paul. The prosecutor's reasons for striking Stanley Scott were that he had prosecuted him for a bad check and that Scott currently was a defendant in a child support case. (Vol. 2, Court reporter's transcript, p. 363.) The prosecutor's reason for striking Stevie Scott was that he had prosecuted his brother, Willie Scott, in a drug case. *Id.* at 364, 388. As the trial court stated, "[a] venire person's involvement in or connection with criminal activity may serve as a race neutral reason

for the strike of that venire person. And that extends even to close relatives and friends of the juror. Also extends to family members who have been prosecuted for criminal activity." *Id.* at 379. The trial court correctly found that the prosecutor's proffered reasons for striking Stanley Scott and Stevie Scott were race-neutral. *Id.* at 387-388. Thus, they are distinguishable from juror Paul because, unlike Paul (who simply indicated that one of his aunts had been convicted of third degree manslaughter), juror Stanley Scott had been prosecuted by the Pike County District Attorney's Office for a bad check and was a defendant in another case and juror Stevie Scott's brother had been prosecuted by the Pike County District Attorney's Office.

Because his *Batson* claims are refuted by the record, Wood cannot show that the state courts' denial of relief on those claims was an unreasonable application of federal law or was based on an unreasonable determination of the facts. This Court should, therefore, deny the writ.

CONCLUSION

For the foregoing reasons, this Court should deny Wood's petition for writ of certiorari.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 13th day of April, 2009, a copy of the foregoing was served on the attorney for Holly Wood by placing the same in the United States Mail, first class postage prepaid and addressed as follows:

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REPLY BRIEF

(11)

CAPITAL CASE

No. 08-9156

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

HOLLY WOOD, Petitioner,

v.

RICHARD ALLEN, Commissioner, Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama, and
GRANIT CULLIVER, Warden, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

No. 08-9156

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

HOLLY WOOD, Petitioner,

v.

RICHARD ALLEN, Commissioner, Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama, and
GRANTT CULLIVER, Warden, Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondents argue that Petitioner "does not allege . . . any traditional ground for certiorari" and that Mr. Wood is requesting "that this Court engage in a fact-bound review." Brief of Respondents in Opposition to the Petition for Writ of Certiorari, *Wood v. Allen*, No. 08-9156 (Sup. Ct. filed Apr. 13, 2009) ("Resp. Br.") at 17. To the contrary, what is distinctly "fact-bound" is Respondents' opposition brief, which completely ignores, *inter alia*, (1) important differences in how the circuits have applied two key provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") and (2) an important question of federal law regarding the application of medical science to a crucial issue in capital cases -- the mental retardation of the defendant. Moreover, the "facts" on which the Respondents' brief focuses almost entirely are highly selective, incomplete, and misleading. In short, Respondents have offered nothing to undercut Petitioner's showing that

this case raises important federal issues in the states' application of the death penalty. *See* Petition for Writ of Certiorari, *Wood* v. *Allen*, No. 08-9156 (Sup. Ct. filed Mar. 12, 2009) ("Petition" or "Pet.").

I. MR. WOOD'S INEFFECTIVE ASSISTANCE CLAIM CONCERNS A SPLIT AMONG THE CIRCUITS ON AN IMPORTANT FEDERAL LEGAL ISSUE THAT IS RIPE FOR REVIEW

A. RESPONDENTS DO NOT ADDRESS THE CIRCUIT SPLIT REGARDING THE APPLICATION OF AEDPA

In contending that Mr. "Wood does not assert that there is a split in the circuits regarding his ineffective assistance of counsel claim or that this case presents a novel and important question of federal law," Respondents ignore one of Petitioner's primary points -- that this Court should grant review to resolve a conflict in the circuits regarding the interaction of AEDPA sections 2254(d)(2) and 2254(e)(1). Resp. Br. at 17-18; *see also* Pet. at 13-17. Relying upon their reading of *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003), Respondents contend that the interplay between sections 2254(d)(2) and (e)(1) is clear and straightforward: "habeas petitioners are not required to prove that a state court's *decision* is objectively unreasonable by clear and convincing evidence, but they do bear the burden of rebutting state court *findings of fact* by clear and convincing evidence." Resp. Br. at 31-32 (emphasis in original).

But the Eleventh Circuit in this case did not clearly separate its determination under section 2254(d)(2) of whether there was "an unreasonable determination of the facts" from the "clear and convincing evidence" requirement of section 2254(e)(1). In fact, when the Eleventh Circuit held -- mistakenly in our view -- that "Wood has wholly failed to show the state courts made an unreasonable determination of the facts," it noted in support of this conclusion that "Wood has not presented evidence, much less clear and convincing evidence," that his trial counsel did not make a strategic decision to forego the presentation of mental impairment

evidence. Pet. App. 6a, 50a n.23. Most importantly, Petitioner's position is that the "clear and convincing evidence" requirement of section 2254(e)(1) is not relevant at all in this case where the challenge to the state court decision is not based on evidence outside the state court record. *See* Pet. at 14-16.

Petitioner's construction of the language in sections 2254(d)(2) and (e)(1) is consistent with the rulings of the Ninth and Third Circuits. *See Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005); *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *cert. denied*, 543 U.S. 1038 (2004). In those Circuits, federal court review of state court habeas decisions which are not based on evidence outside the state court record is focused on "§ 2254(d)(2)'s reasonableness determination [based] on a *consideration of the totality of the 'evidence presented in the state-court proceeding.'*" *Lambert*, 387 F.3d at 235 (emphasis added). There is no requirement on the defendant to show "clear and convincing evidence" and section 2254(e)(1) does not come into play.

In considering "the totality of the evidence," a judge "must acknowledge significant portions of the record, particularly where they are inconsistent with the judge's findings." *Taylor*, 366 F.3d at 1007. As the Ninth Circuit explained:

> The process of explaining and reconciling seemingly inconsistent parts of the record lays bare the judicial thinking process, enabling a reviewing court to judge the rationality of the fact-finder's reasoning. On occasion, an effort to explain what turns out to be un-explainable will cause the finder of fact to change his mind. By contrast, failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached.

Id. at 1007-08. As a result, the "[f]ailure to consider key aspects of the record is a defect in the fact-finding process," which results in a state court decision that is based on "an 'unreasonable determination of the facts'" in light of the state court record. *Id.* at 1008.

The Eleventh Circuit majority did not apply this standard. Instead, it applied section 2254(e)(1) and conflated its "clear and convincing evidence" requirement with the section 2254(d)(2) analysis by determining that the state court decision was reasonable because "there is evidence to support the state courts' findings" and that Wood failed to present "clear and convincing evidence" against those findings. Pet. App. 50a n.23. In doing so, the Eleventh Circuit failed to evaluate the reasonableness of the state court decision in light of the totality of the evidence as required by section 2254(d)(2), including the following critical evidence contradicting the state court decision:

- On the morning of the penalty phase, Mr. Wood's trial counsel, Kenneth Trotter, unambiguously explained that counsel would not be presenting mental health mitigation evidence to the jury because they had failed to do an adequate investigation -- not based on a strategic decision after a reasonable investigation. As Mr. Trotter told the trial judge, potential mental health mitigation referred to in the Competency Report four months prior "*needs further assessment*" and "*[n]o further investigation has been done, psychologically, of those points.*" (Vol. 5 at 967) (emphasis added).
- Prior to the sentencing hearing before the trial court, in light of material received from the Department of Corrections only on the morning of the penalty phase, Mr. Trotter wrote to his co-counsel reiterating that "we should request an independent psychological evaluation -- even if that means asking for a postponement of the sentencing hearing." (Vol. 18 at 27-28.) But his co-counsel rejected that idea solely based on their conclusion "that the judge would never grant a continuance or they

didn't think [t]he Judge would grant a continuance." (Vol. 17, Aug. 22, 2001 Tr. at 47-48.)

- At the sentencing hearing before the trial court, Mr. Trotter submitted the Competency Report and referred specifically to its findings "that Holly cannot use abstraction skills much beyond the low average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning" as facts that would "mitigate any aggravating circumstance in this case." (Vol. 6 at 1108.)

All of this direct evidence contemporaneous with Mr. Wood's trial plainly contradicts the state court decision, which denied Mr. Wood's ineffective assistance claim on the stated ground that his trial counsel made a purported decision not to present mental health mitigation after a reasonable investigation. *See Wiggins v. Smith*, 539 U.S. 510, 526 (2003) ("The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"). As in *Taylor*, "no rational fact-finder would simply ignore" this critical evidence as the state court did in this case. 366 F.3d at 1006. To further paraphrase *Taylor*, "[a] decision on which turns whether [a man will be executed] merits closer judicial attention from the state courts." *Id.* at 1007.

Respondents fail to address the conflict between the Eleventh Circuit majority and *Taylor*. Respondents contend that the Eleventh Circuit majority "simply made the observation, which is amply supported by the record, that [Mr. Wood] failed to present *any* evidence to show that his counsel did not make a decision against presenting such [mental health mitigation] evidence." Resp. Br. at 32 (emphasis added). But that "observation" can only be reconciled with the state court record if the analysis is limited only to the evidence addressed in the state

court decision, which is precisely what the Eleventh Circuit majority improperly did (and Respondents do). Pet. App. 74a ("the majority altogether disregards direct and specific evidence" contrary to the state court decision).

Tellingly, Respondents, like the Eleventh Circuit majority and the state court, do not address any of the critical evidence described above and in the Petition, or make any attempt to reconcile the state court decision with that evidence. Nor do Respondents address the testimony of Mr. Dozier -- to whom the state court attributed the purported decision not to pursue mental health mitigation evidence -- that he did not recall making any such decision, and, in fact, would have presented mental health mitigation evidence if any were available. Pet. at 18 (citing Vol. 16, Sept. 18, 2000 Tr. at 56-57, 61). That evidence also cannot be reconciled with the state court's decision that Mr. Dozier decided not to pursue and present such evidence. Respondents' failure to address or reconcile this contrary evidence is not surprising in light of the fact that the state court decisions at issue are taken verbatim from orders drafted by Respondents.

Instead, Respondents simply repeat the limited analysis of the record in which the Eleventh Circuit and the state court engaged without explaining in the context of the entire record how any of it bears on a purported decision of counsel not to pursue and present mental health mitigation at the penalty phase of Mr. Wood's trial. For example, Respondents contend that counsel retained an investigator (*see* Resp. Br. at 22-23) even though the investigator's own testimony and memoranda that he prepared demonstrate that his activities had nothing to do with potential mitigation evidence, much less mental health mitigation. Pet. at 24 (citing Vol. 17, Aug. 22, 2001 Tr. at 90-91, 93; Vol. 18 at 40-47). Similarly, Respondents contend that Mr. "Trotter went so far as to issue a subpoena for [Mr. Wood's academic] records" (Resp. Br. at 23)

even though Mr. Trotter never sought to enforce that subpoena nor made any effort to speak with Mr. Wood's teachers about his experience in special education classes. Pet. at 24 (citing Vol. 16, Sept. 18, 2000 Tr. at 128, 148; Vol. 17, Sept. 18, 2000 Tr. at 215; Vol. 28, Aug. 4, 2003 Tr. at 39-40, 55).

Likewise, Respondents speculate on reasons why counsel might have decided not to submit the Competency Report or call its author as a witness. *See* Resp. Br. at 26. But this speculation misses the point for several reasons. First, the Competency Report was prepared for the specific purpose of assessing Mr. Wood's competency to stand trial -- not for the purpose of obtaining mitigation evidence. Pet. at 23 (citing Vol. 7 at 240). Second, had counsel done further investigation, which they admitted they did not do, they would have found that mental health mitigation evidence was available from other sources, including Mr. Wood's teachers and an independent psychologist. Pet. at 26. Third, counsel in fact submitted the Competency Report to the trial court at the sentencing hearing. Pet. at 20.

Moreover, Respondents' speculation that his family members' testimony at the penalty phase "would have been severely undermined if his trial counsel had then presented evidence of his low intelligence" (Resp. Br. at 26) is unsupported by the record and evidences a misunderstanding of the mental health mitigation evidence at issue.[1] "Persons with mild mental

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[1] Respondents characterize Mr. Trotter's penalty phase presentation as "compelling" (Resp. Br. at 26) and claim that Mr. Wood's sister, Johnnie Pearl Wood "testified at length," citing to 12 pages of transcript (Resp. Br. at 25). But even Mr. Trotter's co-counsel, Mr. Ralph, did not share that view. "I don't think that Mr. Trotter -- and it's no disrespect to Mr. Trotter -- brought out enough of Mr. Wood's background through enough witnesses of the type of upbringing that he had had. . . . I felt like there were more circumstances in his background that were potentially mitigating that were not explored from what I had had the opportunity to see and observe and in the brief conversations that we had." (Vol. 16, Sept. 18, 2000 Tr. at 80-81.) Notwithstanding his belief, Mr. Ralph made no effort to supplement Mr. Trotter's penalty phase presentation.

retardation function in all adult roles – they are members of families, have friends, work, marry, and have children." George S. Baroff & J. Gregory Olley, *Mental Retardation: Nature, Cause, and Management* 43 (3d ed. 1999).

In sum, Respondents do not address the Ninth and Third Circuit precedent cited in the Petition, much less make any attempt to explain the Eleventh Circuit majority's holding in light of the state court's undisputed failure to address critical evidence, which directly contradicts the state court's decision. This Court should grant certiorari to resolve the conflict among the Courts of Appeals and to set forth "a comprehensive interpretation of AEDPA's factual review scheme," which has "yet to emerge from the federal courts" despite this Court's "pronouncements in *Miller-El* and *Wiggins*." *Lambert*, 387 F.3d at 235.

B. THE ELEVENTH CIRCUIT'S MISAPPLICATION OF AEDPA IS RIPE FOR REVIEW

Respondents contend that the Court should not grant certiorari because Mr. Wood did not argue in his petition for rehearing "to the Eleventh Circuit that its opinion was erroneous because the court somehow misapplied [AEDPA] in resolving his IAC claim." Resp. Br. at 30. Respondents' contention has no merit.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). For that reason, "[a] litigant seeking review in this Court of a claim properly raised in the lower courts . . . generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Id.* at 535.

Mr. Wood plainly raised and presented his claims in the lower courts that he was entitled to habeas relief because the state court adjudication of his ineffective assistance claim

resulted in both an unreasonable application of the law and an unreasonable determination of the facts under sections 2254(d)(1) and (d)(2). Moreover, in his petition for rehearing and rehearing *en banc*, Mr. Wood *did* argue that, in reversing the district court's grant of relief under AEDPA, the Eleventh Circuit majority overlooked direct and contemporaneous evidence from the time of trial that contradicted and rendered unreasonable the state court's decision denying his ineffective assistance claim on the stated ground that trial counsel made a purported strategic decision not to present mental health mitigation evidence. That was sufficient to preserve the issue for review by this Court.

Respondents rely on *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). *See* Resp. Br. at 30. In that case, the Court declined to consider an issue raised by a litigant "for the first time in his opening brief on the merits" because "a brief on the merits should not 'raise additional questions or change the substance of the questions already presented' in the petition." *Id.* at 645. That principle plainly has no application here.

II. CONTRARY TO RESPONDENTS' ASSERTIONS, MR. WOOD'S *ATKINS* CLAIM RAISES A NOVEL AND IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

In their opposition brief, Respondents fail to acknowledge Mr. Wood's central *Atkins* claim: that certiorari review is necessary in order to reinforce that mental retardation determinations must be based upon scientifically accepted standards to comply with *Atkins v. Virginia*, 536 U.S. 304 (2002). *See* Pet. at 27-32. Instead of addressing Mr. Wood's argument, Respondents claim that Mr. Wood has not asserted "that this case presents a novel and important question of federal law" and that Mr. Wood "is asking this Court for nothing more that [sic] a review of the factual determination of the Eleventh Circuit." Resp. Br. at 33. Respondents are incorrect.

In fact, the Petition presents a novel and important question of federal law, namely whether a state court unreasonably applies *Atkins* when it focuses on an individual's relative strengths in adaptive functioning instead of that person's limitations, which is inconsistent with the established clinical definitions of mental retardation. *See* Pet. at 27-32.

In *Atkins*, the Court held that executing mentally retarded individuals violated the Eighth Amendment's prohibition against cruel and unusual punishments based largely on the emergence of a national consensus against executing mentally retarded individuals. *Atkins*, 536 U.S. at 316. In reaching its decision, the Court recognized the clinical definitions of mental retardation established by the American Association of Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), which "require not only subaverage intellectual functioning, but also significant *limitations* in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *See id.* at 318 (emphasis added); *see also id.* at 308 n.3; *id.* at 318 (focusing on the "deficiencies" and "impairments" of mentally retarded offenders and finding that those limitations "by definition" make them less culpable). Relying on its approach in *Ford v. Wainwright*, however, the Court declined to establish a legal standard for determining whether an individual is ineligible for the death penalty by reason of mental retardation. While recognizing the authoritative standing of the AAMR's and APA's clinically accepted definitions of mental retardation, the Court tasked the states with "developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317 (citing 477 U.S. 399, 405 (1986)) (internal quotations omitted).

Since *Atkins*, many courts, including the Eleventh Circuit and Alabama state courts, have applied standards that conflict with the clinical definitions of mental retardation by focusing on individuals' strengths in adaptive functioning instead of their limitations. *See* Pet. at

29-31 (describing cases throughout the country that impermissibly focus on strengths rather than limitations in adaptive functioning). Indeed, Respondents focus solely on strengths in their opposition brief when they attempt to justify the Eleventh Circuit's holding by quoting a litany of activities in which Mr. Wood supposedly has relative strengths. *See* Resp. Br. at 36. But Respondents do not dispute or even address the authorities cited in the Petition that demonstrate that this non-clinical approach poses the danger that people with mental retardation will go undiagnosed because "[w]ithin an individual, limitations often co-exist with strengths." American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 8 (9th ed. 1992). The clinical definitions of mental retardation stress that, although mentally retarded individuals may have strengths in some adaptive skill areas or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation, such strengths do not preclude a diagnosis of mental retardation. *Id.*

For that reason, "the adaptive prong must remain focused on the individual's limitations, rather than any skills he or she may also possess." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 18 n.29 (Jan./Feb. 2003). Courts that focus on relative strengths without considering an individual's limitations in adaptive functioning fail to apply the clinically accepted definitions of mental retardation that were endorsed by the Court in *Atkins*. This runs the risk that persons whom *Atkins* was intended to protect, including Holly Wood, will be wrongfully executed.

The Court should grant certiorari to clarify that states must apply clinically accepted definitions of mental retardation when making such determinations. *See* Pet. at 31-32. Without the Court's clarification, courts will continue to make mental retardation determinations

based on prejudicial stereotypes and individuals' relative strengths in adaptive functioning that, to laypersons, seem to conflict with a diagnosis of mental retardation. This non-clinical approach, which fails to protect mentally retarded individuals from the Eighth Amendment's ban on cruel and unusual punishments, should be prohibited by the Court.

In his Petition, Mr. Wood explained that the Court has struck down competency standards under similar circumstances. *See* Pet. at 32. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court granted certiorari to clarify the minimum due process afforded individuals for determining whether he or she is competent to be executed, consistent with the strictures of the Eighth Amendment and the Court's decision in *Ford v. Wainwright*, 477 U.S. 399 (1986). Previously, in *Ford*, the Court had declined to "set forth 'the precise limits that due process imposes in this area,'" instead leaving it to the states to "'determine what process best balances the various interests at stake.'" *Panetti*, 551 U.S. at 680 (quoting *Ford*, 477 U.S. at 427). Notwithstanding the states' delegated authority to develop appropriate procedural standards for making competency determinations, the Court reviewed the procedures afforded in *Panetti* and held that the state court provided inadequate due process and that the federal appellate court "employed an improperly restrictive test when it considered petitioner's claim of incompetency on the merits." *Id.* at 671. According to the Court, these errors constituted an unreasonable application of clearly established Supreme Court law (*i.e., Ford*) to which no deference is due under 28 U.S.C. § 2254. *Id.* at 679. As in *Panetti*, this Court should grant certiorari in order to clarify that mental retardation determinations under *Atkins* must be based on the clinically accepted definitions of mental retardation, and that the failure to do so constitutes an unreasonable application of *Atkins*.

III. RESPONDENTS IGNORE THE CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S HOLDING THAT MR. WOOD'S *BATSON* CLAIM WAS PROCEDURALLY BARRED AND THE HOLDINGS OF OTHER COURTS OF APPEALS

Respondents do not dispute that the Eleventh Circuit's holding -- that Mr. Wood's *Batson v. Kentucky*, 476 U.S. 79 (1986), claim was procedurally barred -- directly conflicts with decisions of the Ninth and Fifth Circuits applying *Miller-El v. Dretke*, 545 U.S. 231, 241 n.2 (2005). *See* Pet. at 34 (citing *Reed v. Quarterman*, No. 05-70046, 2009 WL 58903, at *5, *8 (5th Cir. Jan. 12, 2009)[2]; *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007)). Nor do Respondents make any attempt to justify the Eleventh Circuit's holding that Mr. Wood's *Batson* claim was procedurally barred because his trial counsel "did not make any sub-argument comparing black venire members who were struck with white members who were not struck." Pet. App. 14a.

Instead, Respondents address the merits of Mr. Wood's *Batson* claim, which neither the Eleventh Circuit nor the district court addressed in light of their rulings that the claim was procedurally barred. This Court should grant certiorari to resolve a conflict among the Courts of Appeals and determine whether Mr. Wood was improperly deprived of his opportunity to have a federal court address the merits of his *Batson* claim after full briefing.

In any event, Respondents' brief merely confirms that the State violated *Batson* at Mr. Wood's trial. Respondents contend that, unlike black prospective juror Christine B. Jones, who the State struck on the stated ground that "she does not believe in an eye for an eye or in capital punishment" (Vol. 2 at 362), white prospective jurors who gave similar responses "each stated on their jury questionnaires and during voir dire that they are not opposed to the death

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[2] Subsequently published at *Reed v. Quarterman*, 555 F.3d 364, 370, 373 (5th Cir. 2009).

penalty." Resp. Br. at 38. But just like Ms. Jones, white panelists Rosa Green and Bobby Shackelford, who eventually became the foreman of the jury, both stated during voir dire that they did not believe in an "eye for an eye" punishment. (Vol. 2 at 251, 300.) Moreover, when asked during voir dire, whether there were no circumstances in which she believed in "an eye for an eye," black panelist Ms. Jones stated: "Well, I couldn't say under no circumstances." (Vol. 2 at 249.) Although the State claimed that it struck black panelist Jones on the ground that she did not believe in an "eye for an eye," the State did not even pursue the issue with Ms. Green and Mr. Shackelford who gave the same answer during voir dire.

Respondents also attempt to justify the State's striking of four prospective black jurors on the ground that they indicated that they did not want to serve. (Vol. 2 at 360-61, 363-65, 372.) Respondents argue that although prospective white juror Frank Paul "initially stated that he did not want to serve on the jury because he had a job assignment in North Carolina, Paul remained silent when the members of his panel were asked whether any of them would have a problem with the trial lasting a week, even though other jurors (including Alvin Rodgers) stated that they would have trouble serving on the jury if the trial lasted that long." Resp. Br. at 38.

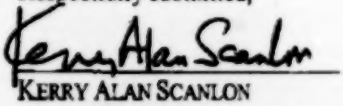
But Mr. Paul was at least equally insistent as the struck black panelists that he could not serve on the jury. Thus, when the trial judge inquired whether any of the prospective jurors had "a reason why you should be excused from jury service during the present term of court because of undue hardship, extreme inconvenience or public necessity" (Vol. 1 at 105), Mr. Paul stated that his job responsibilities required him to be in North Carolina and "*I desperately need to get back up there as quickly as possible. I came in last night just for today.*" (Vol. 1 at 111-12) (emphasis added).

In light of his desperate need to return to North Carolina, Mr. Paul was just as, if not more, insistent about his desire not to serve as the struck black panelists. Two of the struck black panelists stated that they were students and did not want to miss classes, another stated that he needed to work to pay child support, and another cited a dental appointment. (Vol. 2 at 360-61, 363-65.) *See Snyder v. Louisiana*, 128 S. Ct. 1203, 1211 (2008) ("The implausibility of this explanation [that a black juror was struck because of his reluctance to serve] is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'."). Moreover, Respondents do not even attempt to justify the prosecutor's strike of three black panelists on the ground that they had relatives who had been convicted of or accused of crimes, which respondents admit also was true of Mr. Paul. *See* Resp. Br. at 39.[3]

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: April 23, 2009

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---

[3] In this regard, Respondents only attempt to distinguish the circumstances surrounding the strikes of two other prospective black jurors, Stanley Scott and Stevie Scott, from those surrounding Mr. Paul. But even if Respondents argument regarding those two jurors ultimately were accepted, that would not negate the *Batson* violation in this case because "'the Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Snyder*, 128 S. Ct. at 1208 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994), *cert. denied*, 513 U.S. 891 (1994)).

No. 08-9156

IN THE SUPREME COURT OF THE UNITED STATES

HOLLY WOOD
Petitioner,

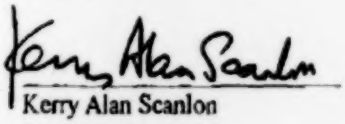
v.

RICHARD F. ALLEN, Commissioner Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama, and
GRANTT CULLIVER, Warden,
Respondents.

CERTIFICATE OF COMPLIANCE

I, Kerry Alan Scanlon, a member of the Bar of this court, certify under penalty of perjury that, in accordance with Supreme Court Rule 33.2(b), the Reply Brief In Support Of Petition For A Writ Of Certiorari contains 15 pages, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

Respectfully submitted,



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GRANTT CULLIVER, Warden,
Respondents.

CERTIFICATE OF SERVICE

I, Kerry Alan Scanlon, a member of the Bar of this Court, certify under penalty of perjury that, pursuant to Supreme Court Rule 29.3, on April 23, 2009, a copy of the Reply Brief In Support Of Petition For A Writ Of Certiorari was mailed via Federal Express for overnight delivery to:

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All parties required to be served have been served.

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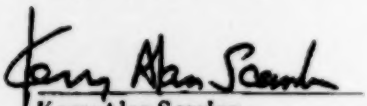

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April 23, 2009

Honorable William K. Suter, Clerk
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: ***Wood v. Allen, Comm'r, Alabama Department of Corrections, et al.*, Case No. 08-9156**

Dear Mr. Suter:

Please find enclosed for filing in the above-captioned matter an original and eleven (11) copies of Petitioner Holly Wood's Reply Brief In Support Of Petition For A Writ Of Certiorari, along with a Certificate of Compliance and a Certificate of Service. Please date-stamp and return one copy of each document in the self-addressed, stamped envelope.

Please contact me at (202) 682-3660 if you have any questions. Thank you for your assistance in this matter.

Respectfully submitted,

Kerry Alan Scanlon

Kerry Alan Scanlon

Enc.
cc: Henry M. Johnson

JOINT APPENDIX

135

CAPITAL CASE
No. 08-9156

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IN THE

Supreme Court of the United States

HOLLY WOOD,
Petitioner,

v.

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama,
and GRANTT CULLIVER, Warden,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX
VOLUME I OF II

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* * *

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DATE	DESCRIPTION
***Alabama v. Wood*, CC-94-07, Ala. Cir. Ct. (Pike County)**	
10/17/1994 - 10/20/1994	Motions hearing, jury voir dire, guilt phase of trial, and conviction by jury of capital murder.
10/21/1994	Penalty phase hearing and jury recommendation of death by vote of 10-2.
12/2/1994	Sentencing hearing before judge.
12/9/1994	Sentencing hearing, pronouncement of sentence of death by electrocution by judge, and Order of the Court on Imposition of Sentence.
***Wood v. Alabama*, CR-94-0481, Ala. Crim. App.**	
7/3/1996	Order by Alabama Court of Criminal Appeals affirming conviction and death sentence on direct appeal.
***Ex parte Holly Wood*, No. 1960659, Ala. Sup. Ct.**	
3/13/1998	Order by Alabama Supreme Court affirming conviction and death sentence on direct appeal.
***Wood v. Alabama*, No. 09-5762, U.S. Sup. Ct.**	
12/7/1998	Order by United States Supreme Court denying petition for writ of certiorari to the Supreme Court of Alabama.

DATE	DESCRIPTION
***Wood v. Alabama*, CC-94-7, Cir. Court of Pike County, Ala.**	
9/18/2000	Rule 32 Hearing.
7/2/2001	Second amended petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure for relief from judgment filed by Holly Wood.
7/19/2001	Answer to Wood's second amended petition for relief from conviction and sentence of death filed by the State of Alabama.
8/22/2001	Rule 32 Hearing.
11/19/2001	Brief in support of second amended petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure for relief from judgment filed by Holly Wood.
11/27/2001	Final order issued by Alabama Circuit Court for Pike County denying petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure for relief from judgment.
12/13/2001	Objection to the court's adoption of the state's proposed final order.
2/8/2002	Motion to Supplement the Record on Appeal.
2/20/2002	Order granting Motion to Supplement the Record on Appeal.
3/15/2002	Order modifying February 20, 2002 order granting motion to supplement the record on appeal.

DATE	DESCRIPTION
***Wood v. Alabama*, CR-01-0700, Ala. Crim. App.**	
4/4/2002	Brief of appellant filed by Holly Wood.
5/9/2002	Brief and argument for appellee filed by the State of Alabama.
6/6/2002	Reply brief of appellant filed by Holly Wood.
8/15/2002	Supplemental brief addressing the impact of Atkins v. Virginia filed by Holly Wood.
8/15/2002	Supplemental brief addressing the inapplicability of Atkins v. Virginia filed by the State of Alabama.
8/29/2002	Supplemental brief responding to the arguments raised in the State of Alabama's August 15, 2002 Brief.
4/25/2003	Order by Alabama Court of Criminal Appeals remanding case to the Circuit Court with instructions to conduct an evidentiary hearing on Wood's claims of mental retardation and ineffective assistance of counsel concerning the presentation of evidence of mental retardation.
***Wood v. Alabama*, CC-94-7, Cir. Court of Pike County, Ala.**	
8/4/2003	Rule 32 Hearing.
9/15/2003	Proposed final order filed by the State of Alabama.
9/19/2003	Proposed final order filed by Petitioner Holly Wood.

DATE	DESCRIPTION
9/24/2003	Return to remand and final order issued by Alabama Circuit Court of Pike County denying Wood relief.
***Wood v. Alabama*, CR-01-0700, Ala. Crim. App.**	
1/6/2004	Order issued by Alabama Court of Criminal Appeals affirming the circuit court's judgment.
2/20/2004	Order issued by Alabama Court of Criminal Appeals denying Holly Wood's application for rehearing.
***Wood v. Alabama*, 1030817, Ala. Sup. Ct.**	
5/21/2004	Order issued by the Alabama Supreme Court denying petition for *writ of certiorari.*
***Wood v. Campbell*, 2:04-CV-509, M.D. Ala.**	
5/26/2004	Petition for writ of habeas corpus filed by Holly Wood. Docket No. 1. (Entered: 5/27/2004)
2/21/2006	Brief/memorandum in support of petitioner Holly Wood's brief addressing the merits of claims raised in his federal habeas petition. Docket No. 55. (Entered: 2/21/2006)
5/2/2006	Brief/memorandum in opposition filed by Donal Campbell (respondent). Docket No. 60. (Entered: 5/02/2006)
6/13/2006	Reply Brief addressing arguments raised in respondent's merits brief filed by Holly Wood. Docket No. 63. (Entered: 6/13/2006)

DATE	DESCRIPTION
11/20/2006	Memorandum opinion and order by U.S. District Court for the Middle District of Alabama conditionally granting petition for writ of habeas corpus as to Claim A(1)(e) that Trial Counsel was Ineffective for Failing to Investigate and Present Evidence of Mr. Wood's Mental Retardation and Mental Disability; and denying the petition for writ of habeas corpus in all other respects. Docket No. 64. (Entered: 11/20/2006)
***Wood v. Allen*, 06-16412, 11th Cir.**	
1/22/2007	Brief of appellant filed by the State of Alabama.
2/27/2007	Responsive brief of appellee and principal brief on cross-appeal filed by Holly Wood.
4/9/2007	Brief of cross-appellee and reply brief of appellant filed by the State of Alabama.
4/26/2007	Reply brief of cross-appellant filed by Holly Wood.
9/16/2008	Judgment by the Eleventh Circuit Court of Appeals, per curiam issued as mandate, affirming district court's November 20, 2006 order denying Wood's Atkins and Batson claim but reversing the order's grant of the writ based on ineffective assistance of counsel and remand with instructions to deny Wood's petition.

DATE	DESCRIPTION
10/6/2008	Petition for rehearing and rehearing en banc filed by Holly Wood.
11/12/2008	Judgment issued by the Eleventh Circuit Court of Appeals, per curiam issued as mandate, denying petition for rehearing and rehearing en banc.
***Wood v. Campbell*, 2:04-CV-509, M.D. Ala.**	
11/24/2008	Judgment entered by the Eleventh Circuit Court of Appeals, per curiam issued as mandate, affirming district court's November 20, 2006 order denying Wood's Atkins and Batson claim but reversing the order's grant of the writ based on ineffective assistance of counsel and remand with instructions to deny Wood's petition. Docket No. 73. (Entered: 11/25/2006)
12/1/2008	Order by U.S. District Court for the Middle District of Alabama denying Wood's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Docket No. 74. (Entered: 12/01/2008)
***Wood v. Allen*, 08-9156, U.S. Sup. Ct.**	
3/12/2009	Motion for leave to file in forma pauperis; petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit filed by Holly Wood.
4/13/2009	Brief of respondents in opposition to the petition for writ of certiorari filed by the State of Alabama.

DATE	DESCRIPTION
4/23/2009	Reply brief in support of petition for writ of certiorari filed by Holly Wood.
5/18/2009	Order issued by the Supreme Court of the United States granting motion to proceed in forma pauperis; granting petition for writ of certiorari limited to questions 1 and 2 presented by the petition.

[957] (The trial of this cause resumed on Friday, October 21, 1994, the following day after the guilty verdict by the jury.)

THE COURT: Let the record reflect that all parties are present, including the defendant, and we are outside the presence and hearing of the jury. Mr. Wood, yesterday afternoon, approximately at 4:45 to 5:00 o'clock this jury returned a verdict finding you guilty of the capital offense of murder during burglary in the first degree. And for the record at this time I find and pronounce you guilty of the capital offense of murder during burglary in the first degree. Now, is there anything that we need to take up outside the presence of the jury before we go in there and start the sentencing phase of the bifurcated hearing with the jury?

MR. TROTTER: Yes, sir, we do have one problem with the notice of the aggravating circumstances.

THE COURT: Yes, sir.

MR. TROTTER: We don't have any problem with the State deleting the circumstance regarding atrocious, or heinous. We do, however, have problems with notice that was given in the amended notice with regard to the third factor, where they allege that it was a crime involving violence. We haven't been given notice. That was the first that we have been notified of that today.

[958] THE COURT: As I remember correctly, on the first notice that was filed by the State, they gave notice of three aggravating factors. The first one being of course the nature of the crime that is alleged in the indictment. That is it was murder during burglary in the first degree, which is a specified aggravating factor in the statute. The second one was

that he had been previously convicted of a crime involving violence, and the third one was the heinous nature aggravating factor. I also note that in their motion they did reserve the right to amend on that.

Now, then the State may respond as to adding and deleting that they have made in their amended notice of aggravating factors where they added the ground the crime took place while the defendant was under sentence of imprisonment, which includes parole or probation.

MR. SMITH: Judge, with all due respect, I think you got the two reversed. We did notice that the defendant had been convicted of assault first degree, and that he was under sentence of that law, as the aggravating circumstance. Of course, by definition in the statute, under sentence of law includes on parole. We added a little language explaining that but it, I think, met certainly all the statutory language. That same offense, assault in the first degree is by very nature of it's definition a violent act. And I just added on the amended notice that [959] I made this morning, breaking them out and distinguishing them that they were two separate statutory aggravating circumstances, and of course they are only statutory aggravating circumstances, that is that he was under sentence of law, that same assault first degree case and on parole, and that assault first degree was a violent act against another person, the same case. And, although we feel like it should be, we would have to concede that the rulings of the Court would not permit us to go forward on this evidence on the heinous, atrocious and cruel offense.

THE COURT: The heinous, cruel is based on the evidence I heard in the trial, on the guilt phase, I do not find that there is any evidence that comes to the

level that is required by the case law explaining and defining that aggravating circumstance. Therefore, there would be no reference in front of this jury as to that statutory aggravating circumstance. Do either one of you have any code sections, cases that you wish to proffer to the Court concerning the notice provision of the aggravating circumstances being noticed to the defendant?

MR. DOZIER: Judge, let me say this for the record. As far as the notice requirement, the cases I have read that if you are going to proceed under the capital punishment statutes, that any and all aggravating circumstances that you are going to proceed with down the road at sentencing [960] should be alleged in the indictment. The only aggravating circumstance alleged in the indictment in this particular case is burglary. Since the imprisonment, the prior imprisonment and all that, was not alleged in the indictment, we would move to exclude any other aggravating circumstances, because the State failed to alleged it in the indictment and give us proper notice. Delivering notice at a later date that you are going to proceed on other aggravating circumstances which are not listed in the indictment is not the way to do it under the criminal rules of procedure. The way I read the cases, whatever aggravating circumstances you want to go forward with has to be alleged and set out in the indictment. So, therefore, again we would move to exclude any reference to the defendant being in prison on a prior crime for violence or whatever other aggravating circumstance they have other than burglary.

THE COURT: While Mr. Smith is responding to that, can somebody hand me the court file that is out

on the bench that has the brown folders in it? That is number 2 of 2, please.

MR. SMITH: Judge, I think that counsel may be correct in the what the courts have called this doubling, where the actual offense charged is also a statutory listed aggravating circumstance. Certainly it would not be proper for us to have put in the indictment that he was [966] amended notice of aggravating circumstances on this date, which is October 21, 1994, and your objections are overruled and denied.

Is that all the motions we need to take up?

MR. TROTTER: No, sir. Oh did you want to take up Jury charges now, or do that later?

THE COURT: You need to give them to me and let me read them and we will do that before I give charges at close to the jury. A little premature to take it-up now, because I don't know what the evidence is.

MR. TROTTER: We have one other request at this time. This one involves the presentence and any presentence report that might go to the court. Are we going to take those up later?

THE COURT: The presentence, as the statute set out, that when a jury returns a verdict in the guilt stage, we go immediately with that jury into the sentencing phase which we are about to do. After we finish and receive whatever recommendation they give, then I will set a date for a sentencing hearing before the court. I will order a presentence report be filed, and it will be given copies to you, to the .State and to the Court, and at the time of that sentencing hearing, we will take up the contents of the. Presentence report. There it not going to be presentence

report that is submitted to this jury. I [967] don't think it is proper anyway at this time.

MR. TROTTER: Your Honor, the reason we do this, is that in May of this year an evaluation was done by Dr. Kirk in connection with the evaluation that was done at Taylor Harden Medical Facility here in this state, and in that report the doctor makes indication that there is antisocial behavior, there is a history of antisocial behavior and problems with anger control in the defendant. No further investigation has been done, psychologically, of those points, and prior to any final sentencing by the Court we would request that there be further psychological evaluation done of the defendant, although that won't be admissible to this jury prior to the judge rendering his final verdict.

THE COURT: You are asking for another psychological after May of 1994?

MR. TROTTER: There was one done in May of 1994, that indicates that the defendant may have psychological problems that need further assessment. We don't intend to introduce that report today to the jury, but we are asking that this be done prior to the judge's final verdict.

THE COURT: Okay I will consider that after we finish today. Since you don't intend to put it in, I am assuming you will go to some kind of psychological or mental duress or whatever is listed in the mitigating circumstances today [968] We will take that up after this jury has been released.

MR. TROTTER: The defense has one further.

THE COURT: Let's do it. That is what I am back here for.

MR. TROTTER: We requested various reports on the September 2nd, hearing that was held here in the Court and on that date we requested records from the Boards of Pardons and Paroles and the various state prisons in which Mr. Wood may have been incarcerated. We have, never received those reports, as of last night in going through the court file. Those aren't in the file. I did speak with Mr. William Taylor this morning and he gave me some information regarding the files that are contained in this courthouse, but himself stated he is not sure if that is all the files, and indicated, there may be files in Elba and in other systems throughout the state that we have not yet had access to. Further, with reference to the September 2nd hearing; there was a request made at that time, and I believe the record will support this, that a request was made for records from the Department of Human Resources, and that was omitted from the judge's final order. I don't know exactly how that happened, and I guess the transcript Will have to bear out the facts regarding that, but we have not been provided with any records regarding DHR, and in talking with the defendant's family, this week I have learned that there was indeed involvement with the [969] DHR with the defendant's family, when the defendant was approximately fifteen or sixteen years old.

THE COURT: Well, if I remember correct and the record will correctly bear it out, whatever was said. I went over each of the items requested in your motion, on that day as far as where records are to be ascertained from, and there was some that if I remember right, and I don't have my notes here, all I know is what my order reflects, that were saying no we don't need those, we do need these. And the Alabama Department of Pardon and Parole is listed first as

those agencies that are to provide those records, and Troy Police Department, Luverne Police Department, Pike County Sheriff's Department. Then I went down and got the Board of Corrections, Taylor Harden, Brice and Searcy. And those were the ones that were indicated to me by my notes from the defense that they specifically wanted, and those are the ones I ordered. Now, I don't have anything about the Department of Human Resources. And without my notes here in front of me I can't tell you whether that is what was reflected that deleted by you all or not. I don't know, because that was a long order and a long hearing. As far as the records from the Department of Pardons and Paroles, Butch Taylor is a parole officer. He is an agent of the Department of Pardons and Paroles. And did he give you the information you requested that he [970] said he had.

MR. TROTTER: He basically looked through the file for anything that he considered relevant and told me there wasn't anything that was relevant. But I haven't, the defense has not had an opportunity to examine those records themselves.

MR. SMITH: Judge, Mrs. Diane Boutwell, who is the secretary, clerk in the Elba Pardon and Parole office is under subpoena by the State to be here this morning at 9:00 o'clock with their file. We have no objection to letting the defense look at the whole thing.

THE COURT: Well, when she gets here and we get to a point, we will take a break and we will look at that file that she has and give you full access to that, and see what's there, and if we need to bring Mr. Taylor down at your request we will look through his file and I will give you access to that.

MR. SMITH: I would like to make clear that I haven't seen the file. I don't know what is in it, but she was notified and and subpoenaed to be here.

THE COURT: Well, there are certain ones. I designated certain ones that would be under seal, and certain ones would not. And the ones that were under seal were reviewed, and I gave you full access to them. I did not deny you access to any of that, and the ones that were just to be filed, I [971] will be very honest with you I didn't look for them. I expected them to be filed. This is the first notice that one was not filed.

MR. TROTTER: We would just like to note the objection for the record that those records were not provided.

THE COURT: Well, like I say, I entered the order. That was some twenty-one days ago and I expected it to be filed. No one has brought notice to me that those records have not been filed. All I said was here they when I gave you the file and let you, and I opened them up, as I told you I would, and glanced at those and reviewed them, that were under seal, and I said you may look at everything that is there.

MR. TROTTER: Yes, sir.

THE COURT: Okay, let's go out and do this gentlemen and lady. We will take a break when this lady from Elba is here and give her time. Objection denied.

(At this time with the defendant and his counsel present the trial continued before the jury.)

THE COURT: Is the State ready to proceed?

MR. SMITH: The State is ready, Your Honor.

[972] THE COURT: Is the defense ready to proceed?

MR. DOZIER: Ready, Your Honor.

THE COURT: Ladies and gentlemen, as I have done every time we have come back from an overnight recess, I ask you the first question. Do any of you have anything you wish to report?

There is negative response.

OPENING CHARGE TO THE JURY

BY THE COURT:

Ladies and gentlemen, the law provides that upon conviction of the defendant for a capital offense, the trial court shall conduct a separate sentencing hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentencing hearing shall be conducted as soon as practical after the defendant has been convicted. The State and defendant shall be allowed to make opening statements and closing statements, arguments at the sentencing hearing, and the order of presentation of statements, arguments, and the order of presentation of the evidence shall be the same as held at the trial in the guilt phase. At the sentencing hearing the evidence shall be relevant to sentence, and shall include any matters relating to the statutory aggravating and mitigating circumstances, plus any other mitigating circumstances offered.

The State shall have the burden of proving beyond a [973] reasonable doubt the existence of any aggravating circumstances. The defendant shall be allowed to interject the existence of any of the statutory mitigating circumstances and any additional mitigating factors. After the hearing of the evidence, and the

arguments of both parties at the sentencing hearing, you Shall be instructed on your function and the relevant law. You shall then retire to deliberate concerning the advisory verdict you are to return.

Is the State ready to make opening argument?

MR. SMITH: Yes, Your Honor.

THE COURT: You may proceed.

OPENING STATEMENT TO THE JURY

BY MR. SMITH:

May it please the Court? Ladies and gentlemen, I first want to thank you very much for your verdict of guilty of capital murder. I asked you draw a line in the dirt and as the most important persons in this trial, and I submit to you the most important persons in this county, the jury in this trial of the State versus Holly. Wood charged and now convicted of the offense of burglary and murder occurring in the same crime, capital murder. You have made the stand. You have made a stand for law enforcement, for decency, for the protection of the people in this county. Every one, as you know, and I am sure you have had the same thoughts, everyone is concerned about crime. Those were some of the questions that were asked [974] of you in the very start of this trial, when you as a jury venire, before you were picked as twelve jurors, questions about the rise of crime and the concern of crime. And you have made a stand on that, you have made a point on that, and I thank you.

But there is one further stage now that we have to go through ladies and gentlemen. Everybody wants something done about crime, and you didn't volunteer. Not one of you volunteered. But as citizens of the United States and Alabama and Pike County, you

have drawn a duty. This is the reverse side of these freedoms that we enjoy in this country. You have got the duty of taking a stand and taking a position and saying the buck stops here, with each of you twelve as a juror. Now, at this stage of the trial, evidence will be offered to you and you will be relieved to know, I am sure that all of the evidence you have already heard has not got to be represented. That is certainly not. We will offer just as a matter of law and evidence all of the evidence you have already heard, and you may consider all of the evidence that have already heard in your deliberation for an advisory verdict, or recommendation verdict, to the judge, whether the sentence should be life without parole or death in the electric chair. Now, in addition to that, the law provides certain aggravating circumstances that the State must prove beyond a reasonable doubt, and you have had reasonable doubt talked to you. So I [975] am not going to belabor it anymore. But the State has to prove that there are aggravating circumstances over and beyond just the crime, although that is certainly part of it, to justify a verdict, an advisory verdict in support of the death penalty. There are three aggravating circumstances in this case. The state expects to present evidence to you, some of it you have already found, of three factors, three circumstances, three aggravating factors that we submit will justify and support a verdict of the death penalty.

I submit to you that the first, that the defendant, the capital offense was committed while the defendant was engaged in a burglary has already as a matter of law and a matter of evidence by you been found. That is the first of the aggravating circumstances. You already found that the murder was committed by Holly Wood, that the murder was commit-

ted in the course of a burglary, as Mrs. Gosha was lying in her bed, Mr. Holly Wood, as you found, took her life lying there in the bed in the house that she was occupying with her mother.

Another aggravating circumstance that the State expects to prove to you is that right here in Pike County, Alabama, this defendant was convicted of a felony offense involving violence to a person. I am going to come back to that in just a moment.

The third aggravating circumstance that we expect to prove to you was that the defendant committed this capital offense while he was under sentence of imprisonment, and in fact was on [976] parole at the time that this murder and burglary occurred. Now, we are going to present evidence to you that on January 28th of 1985, after having been convicted, Mr. Holly Wood was convicted of assault in the first-degree for shooting another young woman with a shotgun, and nearly killing her, was sentenced to fifteen years in the penitentiary, after serving a little over six years of that sentence was paroled and was a parolee at the time that he killed Ms. Gosha.

Those are the three aggravating circumstances that we expect the evidence to show and submit to you, and I submit to you ladies and gentlemen that because of those aggravating circumstances, and let's quit talking about nice typing on a piece of paper. Let's get, as friends of mine say, get the hay down where the goats can eat it. That man Holly Wood almost took a young woman's life by shooting her with a shotgun, was sent to prison and got let loose early, and while he was out on the streets of our community, slipped in another woman's house and shot her dead in the head, lying in her bed, and I am not trying to be a poet. Those are the words you

heard. And that is an offense and a defendant we submit to you that justifies a verdict, an advisory verdict to this Court of death. Thank you.

THE COURT: Defense.

[977] OPENING STATEMENT TO THE JURY

BY MR. TROTTER:

Ladies and gentlemen of the jury, it is my first opportunity to address you here at this court. This is also one of the first opportunities you are going have to get to know a little bit more about the life of Holly Wood, the defendant in this case. Mr. Wood, who is seated right here to my left, as you know, you all have found guilty of the offense of capital murder. You all did that in the trial phase. So we are no longer here to determine whether or not Mr. Wood is guilty. You all have returned a verdict that he is guilty, and I accept that. I understand that that's your role as the fact finder is to determine exactly what happened. You have stated by your verdict that you believe that Mr. Wood went to Ms. Gosha's house on September 1st and shot her. What we are here today is not to dispute that. You all have already rendered your verdict on that. We're also not going to dispute what Mr. Smith about Mr. Wood's prior conviction of shooting another girlfriend.

What we are here today are to discuss, as the defense we would like to present to you certain factors which you are allowed by law to take into consideration as to why Mr. Wood should receive life in prison without parole or the death penalty. That option is available to you. While you are to consider the aggravating circumstances there are also what is [978] known as mitigating circumstances. These are things, these can be things which are included in the

law and anything in the defendant's life, which could lead you to render a verdict that life in prison without parole is justified or permissible in this circumstance. So you don't have to return simply because he was found guilty in the guilt or innocence phase, you don't have to sentence him to death. The option of life without parole is available to you.

What we are going to present to you today is evidence, not only about Mr. Wood's childhood and upbringing, but also evidence regarding this crime which you have already heard and evidence regarding his prior conviction, and when we tie all these things together we are going to show that there are ample reasons for this jury to return an advisory verdict to the judge in support of life without parole in prison. Thank you.

MR. SMITH: May it please the Court. Your Honor, we would submit to the jury for the record all of the evidence that was presented by the state and the defense in this case in chief and the arguments therein.

THE COURT: The Court orders that the evidence that was presented in the first phase of this trial is resubmitted and considered as evidence before this jury in the second phase of this trial. You may proceed.

[979] MR. SMITH: And the of course physical exhibits.

THE COURT: All Exhibits and all testimony.

MR. SMITH: Your Honor, we would offer as State's Exhibit 26 a certified copy of Mr. Holly Wood's conviction in Pike County, CC-84-124, wherein he was represented by attorney Larry Jarrell, by appoint-

ment and on January 28th, 1985, sentenced by Judge Riley Green to fifteen years in the state penitentiary.

THE COURT: Has a copy been shown to defense?

MR. SMITH: Yes, sir, it has.

THE COURT: Any objections by defense.

MR. DOZIER: No.

THE COURT: State exhibit number 26 is admitted.

MR. SMITH: Your Honor, we would ask to publish it to the jury?

THE COURT: May be published.

MR. SMITH: Your Honor, we would call Mrs. Diane Boutwell.

DIANE BOUTWELL,

having been duly sworn, testified as follows;

DIRECT: EXAMINATION

BY MR. SMITH:

Q. Please tell the members of the jury and the Court your name? [997] that type of offense, wouldn't that be the type of thing you would ask for if he was going to be paroled?

A. That's the purpose of opposing it, to keep him incarcerated to prevent that.

Q. Isn't it common for you all to oppose and for the Board of Pardons and Paroles to release people anyway?

A. No, sir.

Q. So you are saying that you all don't ever object to a parole and the Board of Pardons and Paroles goes ahead and grants it anyway?

A. No, sir, I didn't say ever.

Q. Well, does the Board of Pardons and Paroles parole people even though you object?

A. Occasionally. Mr. Folmar does not make it a habit of objecting or protesting every parole. Therefore, his letters receive consideration when they are sent up there.

Q. So his letters receive consideration. But you are saying in this case his letter didn't receive consideration, but they went ahead and decided to parole him any way, is that correct?

A. Apparently so.

MR. TROTTER: No further questions.

MR. SMITH: No redirect, Your Honor. Thank you.

MRS. HARRISON: State calls Barbara Siler.

MR. TROTTER: We would like to take up a matter at [998] the bench.

THE COURT: Come up.

THE COURT: Let the record reflect we are outside the hearing of the jury.

MR. TROTTER: Your Honor, we would object to the calling of this witness. The assault conviction, Barbara Siler is the victim in that case. That conviction has already been properly admitted, the jury has received evidence of that crime. To go into the details of that, which is what I would expect the State to do by calling this witness would simply be prejudicial and inflammatory and not relevant to this offense. They have already gotten in the fact that he has—

THE COURT: Don't speak so loud. Speak loud enough to be heard but not so loud.

MR. TROTTER: They have already gotten in the fact that he has a prior conviction, and anything else

would not only be inflammatory and prejudicial but also repetitive. We would object on those grounds.

THE COURT: State's response, whoever is going to make it.

MR. FOLMAR: Judge, we would say in response that [999] that we have the burden of proof, as an aggravating circumstance, that it was a crime of violence and the only way that we can prove that beyond a reasonable doubt is by the testimony of this witness, the victim. This is proper proof.

MR. RALPH: That is not the law. They have proven the conviction. They have no obligation, no duty, no legal right to put on the victim. That is purely to inflame the jury. They have proven it.

THE COURT: Okay, we are going to take a short break and I am going to check on one thing and then I will come back.

Ladies and gentlemen, it is one of those times where I must take a break and then I will come back to you. It is going to take me probably about ten minutes. You may stretch if you wish.

(At this time there was a recess in the proceedings, after which with the defendant present the trial continue as follows)

THE COURT: Let the record reflect I back outside the hearing of the jury with counsel, and my ruling is the objection by the defendant is sustained. There will be no testimony allowed as to the [1000] specific details concerning the conviction of assault first degree. My reading of the statute of aggravating circumstances says that it is proof of conviction of a felony involving violence.

MR. SMITH: We will ask the court then to, and we will put it in writing, if we have time to prepare it, a charge on the elements of assault first so that the jury may have something to consider that that is an act of violence.

THE COURT: That is permissible and I will do that.

MR. DOZIER: Your Honor, we would object for the record.

THE COURT: I understand that, but there are provisions for that.

(Jury Present)

THE COURT: Everybody is back present, the jury is present.

MR. SMITH: Your Honor, the State rests.

THE COURT: At this time is the defendant ready to proceed?

MR. TROTTER: We are, Your Honor.

THE COURT: Of course, now, I am going to before you close, we will go out and take up another thing that you brought up earlier. You may proceed.

[1001] MR. TROTTER: Your Honor, we would like to call

Mr. J. P. Wood.

J. P. WOOD,

HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. TROTTER:

Q. Would you state your name for us please? Would you state your name for us please? Your name.

A. J.P. Wood.

Q. Mr. Wood, I am going to ask you to speak up, because the jurors all the way over there need to hear you. So you need to speak up and you can speak into this microphone right here.

A. Okay.

Q. Mr. Wood, are you familiar with that man over there?

A. Yeah, my son.

Q. You stated that Holly Wood is your son?

A. He is.

Q. And would you please tell us, Mr. Wood the type of relationship you have with your son? Is there anything you, can tell us about the relationship you have with your son or about Mr. Wood, is there anything you would like to tell us about him?

A. Well, he is just a good boy of mine at home. Nothing but what he is in now, he's just a good boy.

[1002] THE COURT: Mr. Wood. Mr. Wood, can You hear me.

A. Yes, sir.

THE COURT: You are going to have speak just like you did when you said yes, sir, in the mike then. The ladies and gentlemen of the jury over there cannot hear you very clearly and if you would repeat what you just said about your son Holly Wood? Just repeat it.

A. I said he is a good boy. Around home I didn't know nothing that he done off. He was at home he was a good boy. All my boys was.

Q. Mr. Wood, is there anything you can tell us about when Holly Wood was growing up, did you all do things together?
A. Well, yeah, what I done, I had anything to do why he would come out and help me. He would be right there.
Q. You said he would come out and help you?
A. Yeah.
Q. And what were you doing when he would help you?
A. I would be fooling with the plows and cows and things around there. Hogs.
Q. What is your occupation, Mr. Wood?
A. Farming. Was farming.
Q. And so you are saying Mr. Wood had helped you?
A. Yeah, he sho did.
Q. So you have told us that Holly was a good son? Is there [1003] anything else you would like to tell us about Holly today, Mr. Wood?
A. Well, he was just a good son around the house. He was just good. Sure was.

MR. TROTTER: I have no other questions.

MRS. HARRISON: The State has no questions.

THE COURT: Mr. Wood, you may step down.

MR. TROTTER: Mr. Wood, that is all we have. Let me give you a hand coming down here from the stand.

JOHNNIE PEARL WOODS,

having been duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. TROTTER:

Q. State your name please?
A. My name is Jonnie Pearl Woods.

Q. What is your relationship with Holly Wood?
A. That's my brother.
Q. And are there any other children in your family?
A. Yes, it is.
Q. How many are there?
A. Six in all. Five girls and one boy.
Q. Would you please tell us their names?
A. Yes. I am Johnnie Peal Woods, I have a sister named Lillie Jean Woods—
Q. Mrs. Woods, could you do us a favor and just lean a little [1004] closer to the microphone and speak slow if you would, because the jury also over hear is going to have to hear you. You told us that you are Johnnie Woods?
A. Yes, I am.
Q. And who are the others?
A. Lillie Jean Woods. And my brother Holly B. Woods.
Q. Are you nervous today Ms. Woods?
A. Yes. I am okay. I am okay. Sandra Caldwell, Mae Ola Woods, Willie Pearl Woods. And I also have a deceased brother, Samuel Woods.
Q. What number and order in the family is Holly?
A. The third child.
Q. And who was you all's mother.
A. My mother's name was Betty Jean Simmons. She is deceased.
Q. Betty Jean Simmons. And who was you all's father?
A. My father is J. P. Woods.
Q. Is he also Holly Wood's father?
A. Yes, he is.
Q. So you are older than Holly?
A. I am the oldest one.
Q. where were you all living at the time Holly was born, please?

A. Down on the old Glenwood Highway. That's where he was born at.
Q. And what town is this?
A. [1005] Right just below Luverne, Glenwood, Alabama. Little small town.
Q. How long did you all live there?
A. Some years, long years ago after my mother was deceased.
Q. So who took care of you and Holly and the other children.
A. After my mother was deceased, we stayed with a cousin of our's that kept us like four years, and then after I taken over. They was trying to put us in an orphan home. Therefore, my father—since my mother raised me at a younger age and I learnt a lot of things of how to take care of the household, and I taken all the kids and put them in a household, and my father helped taken care of, what care that we had.
Q. Ms. Woods, you said that your mother was deceased. Do you know when she died?
A. Early '69 or '70.
Q. Do you know how old Holly Wood was at the time?
A. I think may be ten years old or so.
Q. So your mother died. Was your father living with you all?
A. No, he was not.
Q. Where was your father?
A. My father had a wife and family, which we was the other kids.
Q. So your father did not live with your mother and you all?
A. No, he did not.
Q. [1006] He was in with his wife and his children?
A. That's right.

Q. And when your mother died, Mrs. Simmons, Betty Jean Simmons, where did you all go to live?
A. We lived with a cousin of our's. We stayed on a farm.
Q. And what was her name?
A. Sarah Harris.
Q. And did she have any family?
A. Yes, she had six kids of her own plus her mother was in the bed, and she had sister, and some of the kids, was one mental and mother was confined to the bed. And also with us six kids living there with them.
Q. How many people were living in the house at this time?
A. Maybe around at least sixteen. Seven of those kids in her family.
Q. And where were you all living?
A. Down on an old country road, Glenwood Highway.
Q. Where is that?
A. Down Old Brantley Highway. It is way back off in the woods like. Only one house and we lived on a farm there?
Q. What town is it near?
A. Luverne.
Q. And how long did you live in that house?
A. We stayed there like three or four years or so before we moved out and the lady asked my dad, said that she [1007] couldn't tolerate with the kids no longer. So, therefore, he asked—after we moved there they wanted to put us in an orphan home. But my father said no, because he think that maybe he could raise us on our own, and asked me would I be able to take care of them. So we got a house and we moved in a house and that's when I started taking care of them, and I

raised all of them up until everybody got out of school.

Q. I am going to ask you, let me back up here a minute. I want to make sure that the jury is able to hear everything now. So you say that you lived with Mrs. Harris. That was your cousin?

A. That's right.

Q. And when your mother died you all moved into her home?

A. Um, humm.

Q. And with her family. How long did you all live there?

A. Well, maybe like three or four years or so, before we moved out of there.

Q. And then why did you all move out of there?

A. Because she said she couldn't tolerate with us being there any longer because so many kids, and her mother was confined to the bed, and she had a child that was kind of mental, and by it being so many kids and things, and she asked daddy to just find a place for us to go. So we had to leave there. Therefore, that's when I taken over.

Q. [1008] And you said you took over. What do you mean by you took over?

A. We moved in a house and I was the mother, and taken care of all the kids.

Q. And how old were you?

A. My mother died when I was thirteen. So I was like fifteen years and a half, nearly sixteen.

Q. And besides you and your brothers and sisters, were there any other people living with you all?

A. No, we was not. I only had one child after some years or so.

Q. So you had a baby?

A. Uh, huh.

Q. And so you were in essence the mother for this family?

A. That's right. Been a mother for years or so. I raised all of them up. There was seven of us in the family. I am the oldest one and I raised everyone of them up. Tried to send through school and do the best that I know how.

Q. How many years separate your age from Holly's age?

A. Well, I am thirty-seven and he is thirty-two or whatever. Maybe—I don't know. Maybe ten or twelve years or so, maybe. I am not sure.

Q. You say that you are thirty-seven?

A. I am thirty-seven.

Q. And you said Holly is thirty-two or so?

A. [1009] I think so.

Q. So there is not—

A. Not too far apart.

Q. So you are not much older than him?

A. No I am not. We all within maybe a year and seven months, or maybe two or three years apart within all the whole family, me being the oldest one.

Q. Was your father living with you?

A. No, he was not. I had to provide for them mostly when he wasn't there, and when things that we needed for a household I had to do whatever it take to be a mother, and I did the best that I know how in order for to grow up the kids in order for us to have a place and everybody to get out on there own and do what I have to do to take care of them.

Q. Where were you all living?

A. Down the old Brantley—well, we moved to Luverne after we left my cousin and stayed on I believe Wolford Avenue.

Q. You said it was near Brantley?

A. Yeah. Well, my cousin lived near Bratley, but we moved from down there to Luverne.
Q. What, if anything, happened when Holly was fifteen years old?
A. Well, he was in school, and, by us having to help with the household, he had to quit school in order to get a job to [1010] help provide for the household, because we didn't have any help or nothing like that, and trying to help out with the family by him being that age. So he got a job at the Pepsi Cola plant in order to help to provide for the household, because he had got of age and we was short a lot of things. Helped provide for the other kids, because they was growing up bigger.
Q. You said that you had a brother that was deceased?
A. Yes, I do.
Q. What happened to him?
A. My sister had a car wreck and he had brain damage and the doctor said if he lived he wouldn't be nothing but a vegetable, so he was taken away from them, which made a lot of difference in our household, because he was the baby boy, and we only had two boys in the household, and it made a lot of difference in our life style after those years or something.
Q. How old was Holly when Samuel died?
A. Maybe eleven or twelve or something like that. Well, eleven and twelve, but before he was fifteen years old I think.
Q. I know it has been a long time.
A. It has been a while.
Q. So was there many years separating the time between your mother dieing and when Samuel died?

A. [1011] Well, we had been some years. My mother died early seventies and I believe within three or four years or so after then—well my mother passed away, then my brother had a car wreck. So it was within like three or four years or so after then. It was one tragedy after another one, which made a lot of difference. My mother was taken away from us at an early age, because I was only thirteen years old, and the other younger kids was under there. So I had to provide for them. So that made a big difference in our household. By not having a mother and then a brother was taken away from us, which was like kids with no family. We was all trying to stay as close as possible, which was kind of hard for me to do to try to provide for them. I did the best that I know how.

Q. What, if any, type of counseling services did the family, and when I say family, I mean your younger brothers and sisters receive when your mother died and when your brother died?

A. What kind of what?

Q. Counseling. What, if any, counseling did you all receive?

A. Well, we didn't receive any. We all tried to stay as a family to communicate. And it was like something that was taken away from us.

Q. When Holly was fifteen or sixteen where was he going to [1012] school at?

A. We came from Brantley. We moved to Luverne. He went to Luverne High. So that is when he quit school at Luverne High.

Q. And why did he quit school?

A. In order to get a job to help provide for the household, because he was the only son that was there and we needed a lot of things by the other kids

growing up, and it just didn't seem to be, we didn't have things in those days and he just quit school in order to help provide for the household. He got a job.

Q. And what, if anything did he do? You said he helped provide for the household. What, if anything did he do? Did he or did he not give you any money?

A. Well, yeah, he gave me money. He bought a car, when he was fifteen. The car was like maybe two hundred dollars and he paid like a hundred dollars on it, and every two weeks he had to pay money on it. So when he didn't have to pay the money on the car he would give me money to like go to the washer and stuff like that to buy Clorox and washing powder soap, tissues and otherwise. After some weeks when he didn't have it he was taking it to make payments on the car. The reason why he was buying the car was in order to provide for us to have a way to go back and forward to the store in order to get groceries and the [1013] things that we need and to the washer and other places.

Q. Could you tell us about the kind of relationship that Holly has with your family? Let me rephrase that. While he was growing up what kind of relationship did he have with the family, with the other sisters, and brothers in the family, the brother in the family?

A. He was always a real loving boy. We all loved him. He was like, with my dad he was real real close, and after we lost our brother it made a lot of difference, and whatever came to ther beginning of it, he was always there. We would always follow, and he was like a leader with us. We was all under –well we was younger—well, we was

older, but he was the only boy and daddy would always provide, make a sacrifice for him to begin. Like give him the truck and we would all ride in the back of it, or give him the keys and let him drive it. We would all follow. So he was like a leader in the household in order to provide for us, because he was the only son that was there, and he was a loving child.

Q. Do you have any favorite memories about Holly?

A. Yes, that is the only brother that I have, and it makes a lot of difference in our household, because we don't have another one, and it made a lot of difference when they taken our brother away from us, which was in sometime in years growing up and my raising them and taking care of [1014] them. Within the years to come it was the love that was just sometimes taken away from us which was never restored from my mother and brother which was a tragedy that was taken away from us at a younger age and it made a lot of difference in the years growing up.

Q. Are there any qualities that you can tell us about Holly that you admire?

A. I admire my brother because he is the only son and I love him. The whole family love him. We all love him. And he was he type of child that tried to help everybody in the family. We all would do whatever it taken, and he would always help provide. He was always trying to help. He always did whatever he could, and we all would try to sacrifice. We always stayed a family that was close together and we never departed and whatever came down, it might have been a struggle or whatever, but we all stayed together and it made a lot of difference in our household just by being him one son, and our dad, wasn't there with us.

So it made a lot of difference in us just having one boy there to always sacrifice to do the things that we needed in order when daddy wasn't there or when he wasn't around. By having all five girls and it was real big help in our household, because our mother left. I am the oldest child and I tell you it have been a lot of hard days down road, and if it hadn't been for him with them [1015] years and things by him providing for us I don't know where we would have been at.

Q. Ms. Woods, do you know if Holly dated any girls while he was growing up?

A. Yes, he had girlfriends.

Q. Were you able to observe their relationships?

A. Yes.

Q. Did he ever bring girls he dated to the house?

A. Yes.

Q. Did you know Lois Gosha?

A. Yes, I did.

Q. And how do you know Lois Gosha?

A. She met my brother some years ago, and they got together and communicated within years down the line. Lois was a loving, loving woman. She cared a lot about our family. We cared about her. She loved my daddy. She treated us just like we were sisters and brothers. And he loved her and she loved him, which a lot times when things happened she would come to daddy and say daddy this. She would call him daddy just like we did. She never made any difference. Was anything went wrong she would always come to us or either go to daddy. She was always a child that you can always sit down and talk to her or she would always talk. There was anything she would say this, and we always talked to her. We'd never turn our back on her. [1016] She would always

come, and whatever it taken. If it was anything wrong she would always come to daddy and say whatever, and it made a lot of difference. He and her was real, real close. It wasn't just like he just met her and didn't care about her. All the time he was there with her she loved him and he loved her. She was a family girl. We loved her. If she came to us, well then any time or anything we was always there. We never turned our back on her. It might have been some days of difference, but she was just like a sister to us.

Q. Ms. Wood, are you familiar with a man by the name of Amp?

A. No, I am not. I have heard of his name, but I don't know that much about him. No more than just seeing him with my observance. Really I don't know that much about him, but I heard of him.

Q. What have you heard if anything—

MR. FOLMAR: Objection.

MR. SMITH: Improper predicate, Your Honor.

THE COURT: Go in more detail, where the source of hearing is at this point. Objection sustained as to grounds stated.

Q. Ms. Woods, how have you heard about Amp.

A. Well, I heard about—

THE COURT: He's asking how, not what you heard.

A. How did I hear about it?

Q. [1017] Who told you, who has said anything, if anything has been said about Amp to you? You said you have heard people talking about Amp, you have heard things about him, I am just asking you simply who you heard talking about him.

A. Well, just relatives. I don't know anything much about him really.

Q. You don't know whether or not he had any, if any, relationship with Lois Gosha?
A. Well, I heard of a relationship with Lois before but I—

MR. FOLMAR: Objection to what she heard.

THE COURT: Okay, just a minute.

A. I have heard relationship—

THE COURT: Just a minute, ma'am.

A. Sure, go ahead. I am sorry.

THE COURT: Let's lay where she heard it before we ask the question of what she heard.

Q. Has Holly Wood ever mentioned Amp's name?
A. Well, I really just.
Q. Or where have you heard it? You stated that you had heard, and knew something about—
A. Well, I have heard it through my—I have got another brother. I heard it through him about his name or some things. I just heard it from my brother. I have got another brother and I have heard it through him.
Q. You say you have another brother. That's not one of the [1018] ones that you have mentioned. Is this—
A. No, no, I have another one.
Q. Is this like a half brother or something?
A. Yes.
Q. And what did you hear?
A. What did I hear?

MR. FOLMAR: Object.

THE COURT: State your objections. Grounds for your objection.

MR. FOLMAR: As it being hearsay may it please the Court and also the proper predicate as to this point has not been laid.

THE COURT: Ms. Woods, let me just ask you a simple question. You said you heard it from your other brother, and you identified him as a half brother. What is his name please, ma'am.

A. Clemmon Hurd.

THE COURT: Objection as to the grounds of hearsay, pursuant to Title 35A-5-46(d) is the strict rules of evidence do not necessarily apply in this and hearsay is allowable. Therefore, objection is overruled. You may say what you heard from your half brother, Mr. Hurd.

Q. Okay, Ms. Wood, what have you heard from your half brother, Mr. Hurd?
A. [1019] Well, I heard he knew about that Lois Gosha was dating this man named Amp.
Q. Do you know whether or not Mr. Wood had heard that same information?
A. Yes.
Q. And how do you know that?
A. That was from my brother, that's how I knew about it.
Q. Ms. Wood, are you familiar with why we are here today? Have you been informed as to the nature of these proceedings?
A. Well, I am not familiar with it. I am not really familiar.
Q. Are you familiar with the punishments that your brother could possibly receive?
A. Beg your pardon?
Q. Are you familiar with the fact that your brother was charged with capital murder and yesterday

this jury rendered a verdict of guilty on that count? He is charged with the offense of capital murder, and this jury has found him guilty of that, are you familiar with the possible penalties or punishments for that crime?

A. No, I am not.

Q. You don't know what can happen to him?

A. Well, I am not really familiar with it, just tell you the truth.

Q. [1020] So you don't know?

A. Well, I have heard but I am not really just say word for word.

Q. Well, just tell us what you have heard, what you think can happen to Holly?

A. Well, I—that he could die in the electric chair. That's what I heard.

Q. So you are saying you have heard that he could die?

A. Yes.

Q. How do you feel about that, the possibility that your brother could die?

A. I don't feel good about it at all.

Q. What, if anything—

A. I don't want that to happen. I don't want that to happen to my brother.

Q. And why is that?

A. Because I could understand through lifetime. We all have ups and downs. But sometimes, some things some other peoples don't understand, but I just don't want this to happen to my brother, even though sometime you commit a crime. But I just don't believe to my sole that things could go just like this, and I don't want that to happen to my brother. Within him being by hisself, surely lord knows if there is anything, it must be some other way.

Q. So if there were some other way, if there were some other [1021] punishment besides death for your brother is that what you would hope for?
A. Yes, I am hoping for it. I praying, I am hoping for it, that don't happen. I am just hoping and praying that that don't happen.

MR. TROTTER: I have no further questions.

CROSS EXAMINATION

BY MRS. HARRISON:

Q. Ms. Woods, you said that you and Mr. Wood had a sister by the name of Lillie Jean, is that correct?
A. Yes.
Q. Has Lillie ever murdered anybody?
A. No, she haven't.
Q. She grew up in that same family situation did she not?
A. She did what now?
Q She grew up in this same family setting that Mr. Wood did did she not?
A. I don't quite understand.
Q. Well, you raised Lillie, too, right?
A. I sure did.
Q. So she grew up in the same house?
A. All seven in the same household.
Q. And so did Sandra?
A. All seven.
Q. Did Sandra ever murder anybody?
A. [1022] No, she did not.
Q. What about Mae Ola?
A. No, she did not.
Q. And they all grew up in that same house?
A. In the same household.
Q. And you raised them all.
A. I sure did.

Q. Now, you said that you were familiar with your brother's friends?
A. I sure was, that's right.
Q. Did you know Barbara Siler?
A. I know of her name. I didn't know her that well, but I knew of her.

MR. TROTTER: Objection, your honor?

THE COURT: On what grounds.

MR. TROTTER: Approach the bench.

THE COURT: Let the record reflect we are outside the hearing of the jury.

MR. TROTTER: Your Honor, we have already objected once before when the State attempted to call Mrs. Siler to the stand. Now, Mrs. Harrison has asked a question with regards to her, and again we would argue that the State is going to argue aggravating circumstances in this phase of the proceedings and this is irrelevant and [1023] prejudicial, and inflammatory at this phase of the proceedings.

THE COURT: What says the State?

MRS. HARRISON: Judge the State would argue that it is not irrelevant, in that he opened the door, he asked this witness about girl friends or friends of his brother, and we feel that since he opened that door that the State should be allowed to explore that.

MR. TROTTER: Again, Your Honor, we would state that the State, that the defendant has the right to explore all mitigating factors. Whereas the State in these proceedings are limited to aggravating factors. Simply because we opened the door does not change the statutory requirements of the Code of Alabama or the constitution. And we would object to them—

MRS. HARRISON: The State is not going to get into the circumstances of the conviction.

THE COURT: I understand. The State has also under the statute a right of reasonable preponderance of evidence to rebut the mitigating circumstances interjected by the defense. However the only question the State has asked at this point is did she know Ms. Siler. They have [1024] not asked any of the details concerning any possible problems between the defendant and Ms. Siler. Your objection is overruled at this time. However, I give a caution. I do not want any questions in front of this jury going into any details of altercations between Mrs. Siler and the defendant. If you wish to ask those type questions we will go outside the presence of the jury before they are asked in front of them. Okay.

MRS. HARRISON: At this time, Judge, maybe it would more appropriate for us to go outside.

THE COURT: Okay. Ladies and gentlemen, this is another one of those times I have to leave you and go outside your presence. Take a fifteen minute break.

(The following took place outside the presence of the jury in chambers with the defendant and his attorneys present.)

THE COURT: We are outside the presence and hearing of the jury on a request of the State concerning my ruling on Mr. Trotter's objection to the question concerning Ms. Siler, and it was a case of did she know Ms. Siler, I believe was the question that you objected to, is that correct, Mr. Trotter.

[1025] MR. TROTTER: Your honor we did object to that question, but more so we wanted to prevent any

additional information that might be elicited. We didn't know where she was going with this.

THE COURT: Well, if it is not clear on the record, the question as phrased, did she know Ms. Siler, I overrule your objection on that. That is not asking anything other than did she know Ms. Siler. Now, then the State has announced that it wants to come outside the presence of the jury based on the court's instruction I did not want the state to go into any, altercations, problems, criminal offenses involving the defendant and Ms. Siler in front of the jury, and that's why I am assuming we are out here. What does the State intend to do?

MRS. HARRISON: Yes, sir, the State wanted to know and to have a clarification on whether or not in judge's limitations could the State inquire about the relationship, if she knew Ms. Siler and knew of a relationship between she and the defendant, not going into any altercations, or into the incident and circumstances of the assault conviction itself.

THE COURT: What says the defense?

MR. TROTTER: Your Honor, again we would object, because that would call for inadmissible evidence in this phase of the trial. To ask what was the relationship like invariably [1026] is going include part of the assault, because that is a part of the relationship, and to call for that information at this phase of the trial is inadmissible. It is not part of the aggravating factors, to which the State is limited in this phase of the trial.

THE COURT: Okay, let's get Ms. Woods, back here and let's ask the questions to her outside the presence of the jury and see what her response is. Right now, I have no earthly idea. The question posed

by the State, does she know of the relationship between the defendant and Ms. Siler in and of itself is an innocent type question. What I am afraid of is what the response may be and that's what I want to know, because obviously no one has made a proffer of what it might be.

MRS. HARRISON: I have no idea what it might be.

MR. DOZIER: Well, Your Honor, if the district attorney inquired into that, at the end of it then certainly the prosecution is probably going to ask her well he received, based on this relationship he received a fifteen year sentence.

THE COURT: Well that question has not been asked nor been proffered. If it is going to be asked, I have already ruled about the details of the assault first degree.

MRS. HARRISON: Judge, the State had no intentions of asking the question that Mr. Dozier posed. Mr. Trotter opened [1027] the door when he asked the question about the relationships of this defendant and his girlfriends and or women, and that's the only thing that we were inquiring into. If she knew Ms. Siler and if she knew of that relationship.

THE COURT: He has not opened the door as to the details of the assault first degree, and that will be my ruling.

MRS. HARRISON: The State was not going into that, and had no intentions of going into that.

THE COURT: Ms. Woods, have a seat there please, ma'am. The State may ask its questions of Ms. Woods about the relationship that it tends to pose in front of the jury and let's see what her responses will be.

QUESTIONS BY MRS. HARRISON:

Q. Ms. Woods, do you have knowledge of the relationship between your brother Mr. Wood, Holly Wood and Barbara Siler.
A. I believe I need you to read it again?
Q. Did you know Barbara Siler or do you know her?
A. Not really, no.
Q. Did you know that she and your brother dated or had a relationship?
A. I know they dated.
Q. You knew that the did? Had you ever been around them or observed them?
A. No.
Q. Did your brother ever talk to you about her?
A. [1028] No.

MRS. HARRISON: That's all.

THE COURT: Any objection to those questions or those responses, Mr. Trotter.

MR. TROTTER: No, sir, not to those objections or those responses.

THE COURT: Those will be proper questions.

MRS. HARRISON: One other question.

THE COURT: One other question. Ask it back here.

Q. So, therefore, you are not familiar with all of his relationships with women as you testified to earlier is that correct?
A. I am, but with Barbara I am not.

THE COURT: Is that all the questions?

MRS. HARRISON: No, sir.

THE COURT: Go ahead.

Q. Did you know Dorothy Bean?

A. Yes, I do.
Q. Did you know that your brother had a relationship with her?
A. Yes.
Q. Are you familiar with the relationship or the circumstances of the relationship with Dorothy Bean?
A. [1029] Yes.
Q. What kind of relationship did they have?
A. It was a good relationship.
Q. A good relationship?
A. Uh, huh.

THE COURT: Are those the questions you intend to ask her?

MRS. HARRISON: Yes, sir.

THE COURT: Those questions and their responses, as stated back here are proper in my opinion, and if the defense wants to state objection they may do so.

MRS. HARRISON: Judge, I guess the final question that I would ask after that answer would be what does she base that opinion on?

THE COURT: Ask her the question and let's get the response.

Q. What do you base your opinion on that they had a good relationship?
A. On who?
Q. Your brother and Dorothy Bean?
A. She was a loving woman. He liked her. She was a nice girl.
Q. She was a nice girl?
A. Yes, she was.
Q. [1030] Were you aware of when that relationship terminated?
A. No, I was not. It has been some time ago.

Q. Are you aware of the circumstances under which that—

MR. TROTTER: Objection.

THE COURT: Let her ask and get the response.

Q. Under which that relationship terminated?
A. I don't understand.
Q. Well, you do know that your brother and Mrs. Bean ceased to see each other, is that correct? They stopped dating or stopped being together, you know that?
A. Yes.
Q. Do you know why?
A. No, I do not.

MRS. HARRISON: That is it.

THE COURT: Any objections?

MR. TROTTER: No, sir.

THE COURT: Those questions and those responses as stated and as answered, like I say, do not appear to breech the area that we are really concerned about. Let me say this for the record, so everybody knows where I am coming from. I will not entertain questions intended to draw out a response about details concerning any problems that the defendant may have had in specific as to what those problems would be, and any of his past girlfriends, and nor do I expect or want the State to proffer in rebuttal, [1031] if any, any details of such. I have made my ruling clear that the aggravating circumstances, and I do grant that the State has a right to rebut evidence, but I am not going to go into details of prior criminal conduct uncharged, nor the details of prior convictions of which the State has offered as an aggravating circumstance. I want that clear, because if we do it in

front of that jury, people, we take the risk. Anything else we need to take up out here?

MRS. HARRISON: No, sir.

THE COURT: Stretch your legs and lets rejoin.

(Back in main courtroom.)

THE COURT: Let the record reflect we are back in session. Any further questions from the State.

MRS. HARRISON: The State has no further questions.

THE COURT: Any further questions from the defense?

REDIRECT EXAMINATION

BY.MR. TROTTER:

Q. Mrs. Woods, you told us that you were familiar with a man named Amp, is that correct?
A. Yes.
Q. What did you say was the connection between Amp and Lois Gosha?
A. It was a relationship between Amp and Lois Gotha.
Q. Do you know whether or not Holly knew, about that?
A. [1032] Yes, he found out about it.
Q. And do you know how he felt about it?
A. Very angry about it. He turned his back on him within sometime after that was in—
Q. Would you tell us—now, did Holly and Lois, state whether or not they had any children together?
A. Yeah, they had a little boy. And the relationship between him and Holly and the baby made a lot of difference. Holly got real angry about it, because he had turned his back on him, Lois had turned her back on him, because of Amp.

MR. TROTTER: That is it, Your Honor, no further questions.

THE COURT: She may come down. Is this witness released?

MR. TROTTER: Yes, sir.

THE COURT: You are released now. You can go back in the courtroom if you would like.

MR. TROTTER: Lillie Jean Wood, please.

MRS. HARRISON: She has been sitting in here, Judge. We would object. The rule has been invoked.

DEFENDANT: She just came in.

MR. SMITH: Judge, we will withdraw the objection.

THE COURT: I would have overruled in this case. She has not been sitting in the courtroom prior to [1033] just the last two or three questions. Therefore I am going to let her testify.

LILLIE JEAN WOOD,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TROTTER:

Q. Would you state your name, please?
A. Lillie Jean Wood.
Q. Ms. Wood, I am going to ask you to speak into that microphone, if you would, because we need for all the members of this jury over here to make sure they hear everything you say. Would you state your name again, please?
A. Lillie Jean Wood.
Q. And do you know the defendant?
A. Yes, he is my brother.

Q. How many years separate you two?
A. Well I am thirty-six and he is thirty-four.
Q. So you are his older sister?
A. Uh, huh.
Q. Ms. Wood, would you tell us what are the qualities you most admire about your brother Holly?
A. Well, me and him is real close. I am older than him and I always try to tell him what's right. I say you listen to me because I am older than you, you know, and he always [1034] have listen. After he went to prison I really was lost, because you know I always had him to look up to. I could always go and tell him something or ask him for something and he wouldn't ever say no.
Q. Do you have any favorite memories Ms. Wood of you all's child hood together, you grew up in the same home. Do you have any favorite memories of things that you all did together with the other brothers and sisters that you would like to share with us?
A. Well, we played together. I could always ride the bicycle, and couldn't nobody else ride. And anything he had, you know. Me and him was real close. I could always get it and the rest of them couldn't.
Q. How did the other family members feel about, Holly, and how do they feel today, do you know?
A. Everybody is just real pleased with him now. They say this here capital murder case is going to kill him or something, I don't know.
Q. So you are aware that this proceeding could result in capital punishment?
A. Yeah. I can her it on the news. Capital punishment. That's the electric chair.
Q. How do you feel about the fact that after these proceedings that your brother here, if he is sen-

tenced to death, to die, that he could die, how do you feel about [1035] that?

A. I am scared. That's my only brother. I feel like if he committed a crime, electric chair, if they could do anything else besides that, you know, I would be pleased.

Q. So if you knew that there was another option, that he didn't have to be sentenced to die, that there was another option, how would that make you feel?

A I would feel better.

Q. Would you hope that that would be?

A. Yeah, I would, because right now I have been upset since they said the capital punishment was the electric chair, and I just can't hardly stand it, because I was in a car accident and had a concussion at the brain, and anything that frightens me, it upsets me, and I have been sick ever since I heard that.

MR. TROTTER: I have nothing further.

THE COURT: Any questions from the State?

CROSS EXAMINATION

BY MRS. HARRISON:

Q. Mrs. Wood, did you know Ruby?

A. Yes, I did.

Q. How did you feel about Ruby?

A. Me and her was real close. She always come to my house and she would come there and stay and I'd tell her if you don't want to go with Jim there, you just stay on here [1036] with me, you are welcome to stay. Me and her was real close. When she was in Enterprise I would go down there. You know I have got five kids and we

would go down there and stay and she would just made us well pleased, you know. She said, "Girl, go in there and cook," because I loved to cook. If you got food I will fix a meal in a minute.

Q. So you all go along real well?
A. Yeah, we got along real well.

MRS. HARRISON: Thank you.

THE COURT: Any other questions from the defendant?

MR. TROTTER: No, sir.

THE COURT: May this witness be excused?

MR. TROTTER: Yes, sir.

THE COURT: You are excused, ma'am. You may stay in the courtroom if you like.

MR. DOZIER: We need to talk to Holly Wood, just one minute.

THE COURT: I know it will take longer than one. Take about ten minutes and consult with your client.

(Recess in order for the defendant and his attorneys to confer, after which with the defendant and his counsel present the trial continued.)

[1037] DIANE BOUTWELL,

after having been duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. TROTTER:

Q. This is Ms. Boutwell?
A. Yes, sir.
Q. Your name again please?
A. Diane Boutwell.

Q. Could you just go ahead and please restate where you work at?
A. I work for the State Board of Pardons and Paroles at the state probation and parole office in Elba, Alabama.
Q. And what is your function there?
A. I am the secretary.
Q. Ms. Boutwell, do you recognize this?
A. Yes, sir, I do. This is our file on Holly Wood.
Q. I would call your attention, Ms. Boutwell, to a couple of documents in this file, and ask—well, first of all, there has been testimony in this trial that Mr. Wood was not intoxicated at the time he was picked up by the police. Could you tell us what, this is Ms. Boutwell?
A. It is the Alabama Uniform Arrest Report by the Troy Police Department. I am trying to find a date on it.
Q. Excuse me Mrs. Boutwell, could I get you to repeat your response?
A. [1038] It is the Alabama Uniform arrest report completed by the Troy Police Department.
Q. Is that document a document that is kept during the ordinary course of the business of your office?

MR. FOLMAR: May it please the Court, we would object at this time and say it is not a proper predicate. We don't know what that document, if it relates to this case or what.

THE COURT: He hasn't offered it yet and I think he is trying to go into the predicate at this time. I think your objection is premature. Overruled.

Q. Mrs. Boutwell is that part of your file?
A. Yes, sir, as the officer had to have it to complete the parole violation report.

Q. Okay, so then it is part of the ordinary course of the business of your office, is it not, if it is necessary for the report, wasn't it?
A. Yes, sir.
Q. And so it would be kept in the ordinary course of the business of your office, isn't that correct?
A. On certain cases.
Q. And in this case it was?
A. It was on this one.

MR. TROTTER: Judge, we would like to have this marked as Defendant's Exhibit. I am not sure [1039] what letter we are on.

COURT REPORTER: "D".

THE COURT: May I look at it first and if the State wishes to look at it before it is marked. Let me ask you this, Mr. Trotter. I am looking at what appears to be three pages of what I refer to as the police Report. Is that what we are talking about, or are we talking about something further than that as this exhibit?

MR. TROTTER: Your Honor, we are specifically referring to the police report.

THE COURT: These three pages?

MR. TROTTER: Yes, sir. We only need the front page, Your Honor.

MR. FOLMAR: Judge we would—

THE COURT: I will let you look at it. We need to have the Court reporter mark that at this time.

MR. RALPH: Your Honor, there is another letter in there that I have indicated with a white sheet of paper. Can we go ahead and get that marked as well?

MR. TROTTER: We intend to introduce that one also and like for it to be marked as exhibit "E".

(District Attorney looking at file.)

[1040] MR. SMITH: Are we talking about just Exhibit "D" or "D-1" and "D-2"?

THE COURT: He has indicted "D" "D-1" and "D-2", three sheets of incident offense report pages.

MR. SMITH: Judge, I don't particularly see the relevance of these documents and I am not sure the proper predicate has been laid, but we suggest they put the whole file in if they are going to put part of it in. We'd have no objection to those.

MR. TROTTER: We object to that, Your Honor. We will tie up the relevance of this document with questioning of Mrs. Boutwell.

THE COURT: You are offering at this time Exhibit "D" which includes what has been marked "D", "D-1" and "D-2"?

MR. TROTTER: That is correct.

THE COURT: Any objection to "D", "D-1" and "D-2" from the State?

MR. SMITH: Yes, sir, we would object to a part of the file going in and ask all of the file go in.

THE COURT: At this time as to your objection to those. Overruled. Of course, you understand that you can resubmit anything you want. So exhibits "D", "D-1" and "D-2" are admitted.

Q. [1041] Mrs. Boutwell, in this trial there has been testimony that the defendant in this case was not intoxicated at the time the police picked him up on the night of his arrest. Now, would you please read for us, what does this say across the top of this document right here?

A. Says officer's work product may not be public information.
Q. Okay, I am referring to this right here?
A. Alabama Uniform Arrest Report.
Q. Exactly could you repeat it one more time. We have got a lot of jurors here, and we need to make sure they hear you on this?
A. It is the Alabama Uniform Arrest Report.
Q. Ms. Boutwell, could you please read for us what it says right there, what is the charge of this arrest?
A. The charge as listed on her?
Q. Um, humm.
A. Is murder.
Q. And could you read us please the date that this report was made?

MR. SMITH: Your Honor, the document will speak for itself. It is offered as an exception to the hearsay rule under the business record exception, and we would ask for a proper instruction to the jury that the document is only offered as part of their file, and not for [1042] the correctness, accuracy and truth of what is on that piece of paper that she cannot testify to that?

THE COURT: Well, it has been offered as an exception to the hearsay rule, and I will make my instructions at the close of this session to the jury concerning the evidence that has been presented here and its relevance or impact under the laws. He may ask, as has been asked on most every other document that has been produced details contained therein, and I will instruct them as to what the best evidence rule of the document says.

Q. Mrs. Boutwell, could you read us the date that that report was made? Does it contain that date on there?

A. 9-2-93.
Q. That would be September 2nd, of 1993?
A. Ninety-three.
Q. Is there a time on that report?
A. 1:00 o'clock A.M.
Q. Is there any reference on that document to the state of the defendant at the time of his arrest? And again let's get clear, if you don't mind. I don't have a copy of this, I am going to have to share it with you. Who is the defendant or the person named on this arrest report?
A. [1043] Holly B. Wood.
Q. Please read for us, if any, what the state of the defendant was at the time of his arrest?
A. The condition of the arrestee is marked as drinking.
Q. Drinking. Okay. So you are saying that this report here says that the defendant at 1:00 o'clock A.M. was perceived to have been drinking—
A. That is marked on this report, is what I am saying.
Q. Ms. Boutwell, I am showing you something that has been marked as Defendant's Exhibit "E". Could you please tell us what that is?
A. First of all let me explain that the forms are sent out by the parole board which is our central office, the State Board of Pardons and Paroles in Montgomery and we receive a copy in the filed office. It's a document number CO-4017, which was sent to Holly Wood on June 4th, 1992, stating that his case had been reviewed by the Board of Pardons and Paroles and he was denied parole.
Q. And who does that letter come from.
A. From Mr. William Young, the executive director of the State Board of Pardons and Paroles.
Q. And is that document a document that you keep in the ordinary course of your business?

A. Yes, sir.

MR. TROTTER: Your Honor, we would offer this as [1044] Defendant's Exhibit Number "E".

MR. SMITH: No objection to it going in, Judge. Just the same comments that—

THE COURT: It is admitted.

Q. Ms. Boutwell, could you please just read us—this is a short letter. Could you just go ahead and read the entire contents from Dear Sir, on down for us please.

A. Dear Sir: Your case was reviewed by the Board of Pardons and Paroles at an open public meeting. You were denied parole and reset for further consideration during the month of January, 1993. Remarks: Needs anger induced, acting out and reality therapy. The Board hopes you will cooperate with the prison authorities in order that you may receive the best benefits that can be accorded. Yours Very truly, William C. Young, Executive director.

Q. Ms. Boutwell, the area where there is remarks, is that part of, can you discern any, what, if any, discrepancy there is between the type on the remarks that are made and the rest of the letter.

A. No, sir.

Q. This is a copy, and to your knowledge is this a standard form letter that is generally sent out?

A. Once they are considered for parole the parole board sends that form to them I believe id they are denied parole. I can say that in every specific, and the from changes.

Q. [1045] Now, this section regarding remarks, are the remarks on this form letter always the same to your knowledge?

A. I think they would be changed. As you see they are typed in. So I would think they would vary.
Q. So they would vary from case to case, depending on the defendant?
A. According to the board, to the parole board.
Q. Just one last time, just to make sure we are clear, the remarks that the board put into this report indicate what kind of treatment was needed for Holly.
A. At that time according to—
Q. Could you just state what kind of treatment was indicated that he needed by the board?
A. Needs anger induced, acting out and reality therapy.

MR. TROTTER: Your Honor, we know that Ms. Boutwell needs to keep the copies of this probably for he file. We'd like to have a copy made for the court file.

THE COURT: As soon as we take a break the court will makes copies of the exhibits that have been presented so far from the file. Any further questions of this witness.

MR. TROTTER: No, sir.

[1055] further than that.

MR. RALPH: You don't tell them about the override?

THE COURT: No, sir.

(All personnel, including the defendant and his attorneys returned to the courtroom where the trial continued.)

THE COURT: I apologize for taking an extra five minutes rather than the eight. We are at that stage where at the close of the sentencing phase of this trial that the attorneys for both sides have an opportunity to make arguments to you, and we are

going to begin that, after which I will instruct you as to the applicable law that are to apply to the evidence presented to you during this phase of the trial. Is the State ready?

MR. SMITH: The State is ready, Your Honor.

THE COURT: Defense ready?

MR. DOZIER: Ready, Your Honor.

THE COURT: You may proceed.

CLOSING STATEMENT TO THE JURY

BY MR. SMITH:

May it please the Court. Ladies and gentlemen, when I come home from a hard day at work or not, and my wife has had a hard day at work, she asks me have you used up all your words for the day when she wants to have a conversation. She has been out of town this week, and my answer to her this week is [1056] going to be one that I think you are probably going to be glad to hear. I am afraid I have probably used them up for the week. I am going to be very brief with you, but this is just too important for me not to take the opportunity to sit up, stand up and ask you to sit up and stand up for justice. And that is what we are talking about.

I submit to you, ladies and gentlemen, that you have already found and, therefore, it is already proved, the statutory aggravating circumstance that Mr. Holly Wood killed Mrs. Gosha in the course of a burglary. That is one aggravating circumstance that you have already found. I submit to you that the evidence has been provided to you, and the State has proven beyond a reasonable doubt, that at the time

on September 1st, 1993, Holly Wood murdered, killed Ms. Gosha in the course of a burglary, that he was under sentence of imprisonment, that is that he had been sent to the penitentiary, sentenced to the penitentiary and was on parole from the penitentiary sentence at the time that he committed the murder and burglary of Ms. Gosha. That is a second statutory aggravating circumstance that the State has proven, I submit to you.

Further, the State, I submit to you, has proven beyond a reasonable doubt, beyond all doubt for that matter, but certainly beyond a reasonable doubt, that at the time the defendant, Mr. Holly Wood murdered Ms. Gosha in the course of [1057] the burglary, that he had previously been convicted of a felony offense, involving violence to a person, and we expect the judge will give you during his charge some definitions of what assault first degree is, which is the conviction that he had received and been sentenced and was on parole for at the time that he committed this murder of Ms. Gosha.

Ladies and gentlemen, again, your role in this case at this point, and the judge will instruct you in these, is to return an advisory verdict of one of two things. That the sentence for this crime, with the aggravating circumstances, that the State has proven to you, will either be death or life without parole.

Now, you are to balance mitigating circumstances with the aggravating circumstances, if you find beyond a reasonable doubt there are aggravating circumstances, and you consider mitigating circumstances, and you are to weigh the evidence that you receive, weigh it with the law that the Judge will read to you and then you will go back and retire, and there is some mathematics involved, and the judge

will explain that to you. I submit to you, ladies and gentlemen, that in this case, this man, having been convicted of that violent assault, and, sent to the penitentiary, and released on parole, and while he had that grace granted to him by the parole board, and you heard the evidence of the interaction between the district attorney's office and the parole board, but while he was under [1058] that grace of the Parole Board, what did he do, but slip into this young woman's house, in the night—

MR. DOZIER: Your Honor, I object at this time. There has been no evidence he slipped in the house or even went in the house at the time?

THE COURT: Objection overruled.

MR. DOZIER: We except.

MR. SMITH: That he slipped in the house during the night while this young woman laying her bed, and again I use the brutal harsh words, because it wasn't anybody standing around with a coat and tie on there ladies and gentlemen, blew her brains out.

MR. DOZIER: Your Honor, I object to that, terminology blowing her brains out. That is highly prejudicial and highly inflammatory to the jury. We move to exclude and ask the court to admonish the jury to the same.

THE COURT: Objection overruled.

MR. DOZIER: We except.

MR. SMITH: Ladies and gentlemen, I submit to you that this crime with those three aggravating circumstances deserves the death penalty. I ask you don't let such a crime, with such aggravating circumstances go unpunished by any compromise less than the death penalty. Your time to make a stand is

here. Your time to send a message that the citizens of Pike County, [1059] as you involuntarily were selected to represent, that the citizens of Pike County, under the facts of this case and the facts of this defendant, and the facts of Ms. Gosha's death, that you are going to say I won't compromise. The case, the sentence, the crime, the defendant deserves a sentence of death, and not a compromise, and I ask you to so return a verdict. Thank you.

(At the bench)

THE COURT: Let the record reflect we are outside the hearing of the jury. Go ahead.

MR. TROTTER: Your Honor, I would like to object to a statement that was made in the prosecution's argument that one of the aggravating circumstances has already been proved, because the guilt phase and sentencing in capital punishment are entirely separate, and an aggravating circumstance must be proven beyond what's already been proven in the guilt or innocence phase, and the State referred to it as already being proven. I would object to that.

THE COURT: The jury will receive an instruction from the Court, which is based on case law, that if one of the aggravating circumstances is one of those alleged in the indictment, and the jury in the guilt phase has returned a verdict of guilty of [1060] capital murder, it is already proved.

MR. SMITH: Thank you, Your Honor.

CLOSING ARGUMENT TO THE JURY

BY MR. TROTTER:

May it please the Court and members of the jury and counsel.

It is humbly that I come before you today to plead on behalf of my client that when this jury renders their verdict, an advisory verdict to the Judge, of whether or not this defendant should be punished by sentence of death, or by sentence of life without parole, that you return a sentence of life without parole. You have had an opportunity to sit here all week long, and I know you are tired. We are all tired. We have had a long week and it's been hard.

What I ask for you to do now is to seriously consider everything, not only that I am going to say to you in this closing argument, but everything that you heard throughout the course of this week. What's at stake here today is Mr. Wood's life. I understand, and we all know, that this jury has returned a verdict that the defendant is guilty of capital murder. However, as the Judge will instruct you, you are now able to consider aggravating and mitigating circumstances, and these aggravating and mitigating circumstances can be balanced. If you find that the mitigating circumstances in this case outweigh the aggravating circumstances, you can return an [1061] advisory verdict of life without parole.

So let me show you some of the mitigating factors that have been shown not only today during this phase of the deliberation, but during the week when you all had the trial and you all were able to hear the evidence. All that stuff is admissible for this phase, too, related to the circumstances of the crime in this case.

So you have heard information, and I am going to talk about it in detail. I am not trying to bore you, but this is just so important that I ask you to bear with me, and to be patient. You are going to have your opportunity soon enough to go back and talk

about this amongst yourselves. The state has gone over aggravating factors. We have presented some of the mitigating factors. But let me just review some of them for you, I know you all heard the evidence, and I am not trying to insult your intelligence.

By the way let me apologize if I passed any of you in the hallways during the course of the week and not said hello. I am not being rude. I have just been trying to do my job, and let you all do your job.

We have heard from the defendant's family today. Mr. Wood's father came in here. Bless him he is old and he is hard of hearing and it is difficult for him to speak, but he talked about how his son was a good son, and how he cared for his son. We have heard from the defendant's sisters, and how [1062] they loved their brother, how that if there is anything that this jury can do today to give him life without parole, that you should strongly consider that, because they sure don't want to see their only brother, their only living brother sentenced to death. They told us about some of the circumstances that Holly grew up in, how he has lived all his life in this area over in Luverne, how he was born to his mother, and his mother and father didn't live together. His dad had another wife, but had six children with Holly's mother, and how when Holly was ten years old his mama died. He had to get moved in with a cousin with fifteen other people living in a big house. Not that it is wrong with sixteen people living in one house, but not a lot of attention goes to an ten year old body in a house with sixteen different people. He lived there for four years and then moved out and his sister took over the roll as his mother. A sister that is only four or five years older than he is and they basically had to raise themselves from that point on.

When he was fifteen his brother was killed in a car accident, and Holly was in that car when that happened. All right these are just some of the circumstances that have happened in Holly's life. It hasn't been an easy life. When he was sixteen he dropped out of school, as the sisters testified, to go to work. He went to work and helped make money for the family. He purchased a car that they were able [1063] to use to go back and forth to the grocery store. His sister testified he was a good help to the family, and he is their brother and that they love him.

Now, hardship alone and a difficult childhood may not alone be enough for you to weigh, when you are weighing these mitigating factors, and these aggravating factors, that may not be enough for you, but you can consider them and the things that have happened to Holly during his life, along with the factors and the circumstances surrounding the crime in this case. And let me go over those with you, and I am not trying to bore you, but we are looking at these now, not from a perspective of guilt or innocence, but from a perspective of mitigation. Are there things involved and the circumstances in this crime that call for a sentence of life without parole, and not death.

Let me just explain one thing, or clarify one thing and point that out is that life without parole is exactly what it means. Life in prison without parole. It doesn't mean maybe he will get out. It means you go to prison, and the defendant in this case, if you sentence him to life without parole he is not getting out of prison. You don't have to worry about him coming back out and doing something like this again. That's not going to happen. He is not eligible for parole. The Board of Pardons and Paroles won't hear his case, it won't come up. He will be in prison for the

rest of his life, if you all [1064] render that advisory verdict here today. So we are only dealing with one thing. It is not will he get out or will he be sentenced to death and executed. You don't have to worry about that. The option is will he spend the rest of his natural life in prison behind locked doors, secure, guarded and in an armed facility.

As to the factors on the day and the events surrounding this crime. Let me just go over those with you. You all know that Holly, as Salter himself testified, had been drinking since 11:00 o'clock that morning. The police report that we read today says he was still drinking at 1:00 o'clock that night. So keep that all in mind as I go over the facts of what happened, and what we heard here in Court happened. Remember that he was drinking. If he was drinking from 11:00 o'clock in the morning and he's still been drinking at 1:00 o'clock at night there is some alcohol in his system. And that's been shown here by ample testimony.

On that day we are told that Holly and Salter went over to Lois Gosha's house. He tried to carry some diapers and some money over there. Lois and her mother told him to go away and not to come back. Lois said she didn't want the diapers. She didn't want the money to get it for herself. Holly was in love with Lois. That has been testified to here also. She was his girlfriend, she was the mother of his child. Here she was telling him go away, we don't want to have any part of you, [1065] leaving Holly feeling rejected. The day goes on. We know that he's been worried about, he had been worried about Lois having some type of relationship, and I am not saying that it was a romance or anything. That wasn't exactly pointed out. I am not going to say they that the defense says that.

What I am saying was that Holly, the testimony is that Holly thought there was a relationship going on between Amp and Lois, and that made him jealous and he didn't like it. He went to Troy that night according to all the testimony to see if Amp was there with Lois. The testimony is that he did see, and if you look at the statement that was provided to the police by Salter, Holly did see Amp there.

Now, whether or not Amp and Lois were having a relationship is not relevant. It was what Holly was thinking at the time. He is thinking the mother of his child, his girlfriend, the woman that he loves, is seeing another man. Jealousy. This is a human emotion, I think, that a lot of people can feel and relate to, that Holly was feeling jealousy that day. He had been rejected earlier in the day, and now he is suddenly; this jealousy is working up in him, and he has got that alcohol coursing through his system, that he's been drinking since 11:00 o'clock that morning.

Anger. Anger is a natural result of jealousy and rejection. The next thing that Holly felt a deep seated, I am not talking the kind of anger you get when some small thing [1066] happens to you, I am talking deep seated rage, because he suspected that his girlfriend was seeing somebody else and he felt he was being rejected by her. Remember Holly is the same young man who lost his mama when he was ten. Now, his girlfriend has rejected him.

So these are the emotions we are talking about, the circumstances surrounding the murder in this case. This wasn't a cold blooded murder, someone without any alcohol or anything in their system, someone without any other factors.

There are mitigating factors in this case. The alcohol that he had been drinking all day long. The rejection that he was feeling from her saying get away from me, I don't want you part of my life, we don't want you to be a part of your son's life. The jealousy and the rage. These are all things that can be considered as mitigation in this case.

There has been evidence that Holly Wood and Salter were drinking all day, not only on that day but before the crime, on the day before the crime was committed. It is also undisputed that he was drinking when he was arrested. I admit voluntary intoxication is no defense to the actual crime, but you all have done found him guilty of the crime. You said he did it. We are not saying he didn't do it. All we are now arguing is that you have got a choice between death or life in prison without parole.

Now, this alcohol is something you can take into [1067] consideration, and you don't have to condone that behavior when you sentence him to life in prison. You are not sending a—that's not sending a message to anybody. You have found him guilty. This is one thing that you can consider. And it may have been to such an extent that the defendant Holly in this case was not able to understand what he was doing exactly. His reasoning could have been clouded by the different emotions and the alcohol that he was having. The more he drank and the more the thought about Lois. Lois rejecting him. Lois with Amp, not seeing his baby again. It began to work up inside him, festering up inside him, and that's what brought him to do what you all have found that he did.

Holly can't undo what's been done. Nothing that the jury does here today can undo what's been done.

Lois Gosha is dead and we all know that that's a loss to the Troy community and to the world at large.

I am sure if Holly could go back to that day he would want things differently. Lois Gosha was the mama of his child and his girlfriend and he loved her.

You members of the jury have a tremendous choice to make today. A choice between life in prison without parole or death. The family pleaded from the stand that you spare Holly's life to let him live. As his attorney that's someone who's known him over the course of many months, I am also making that plea for him.

[1068] When you go back there today, please consider all the different factors that went into bringing Holly to the point where he is today. Holly didn't end up here for no reason. There are reasons for it. His childhood is part of that. The alcohol that day is part of that. The rage, the jealousy, the anger. You take all those things into consideration. With all that possibility that he would get out of prison. That's not a possibility. Life in prison without parole is exactly what it says.

Thank you.

THE COURT: Mrs. Harrison.

REBUTTAL CLOSING STATEMENT TO THE JURY

BY MRS. HARRISON:

If it please the Court, ladies and gentlemen. On yesterday I failed to thank you for your service and for your attendance here. Today I want to do that, and as I told you earlier, you are very important, as Mr. Smith also said. But I want to thank you on behalf of myself, Mr. Folmar, Mr. Smith, and of course,

Mrs. Jones, who is the sister of Ruby Gosha, representing—she is the family representative.

Now, I told you that the DA's office is seeking justice, and that is exactly what the DA's office is asking for, justice. Mr. Smith has gone over the aggravating circumstances that the State feels and believes that are a part of and supports its case.

[1071] Ladies and gentlemen I ask you don't be that frog. We ask you on behalf of the State of Alabama to come back with the death penalty in this case. Thank you.

ORAL CHARGE TO THE JURY

BY THE COURT:

Ladies and gentlemen, it is my duty again to instruct you or to charge you as to law. In charging you, I want to remind you of the instructions that I gave you yesterday almost at this very time, and that being on October 20th, 1993, concerning the basic law, and defining the terms of reasonable doubt, as well as your duties and functions as jurors. If any one of you feels it be necessary, I will recharge you as to each and every one of these principles of law. If you need that will you please indicate that to me and I will do so.

I will not charge you as to the principle of law of capital offenses charged in the indictment, because that question at this point is settled due to the fact that your verdict you have found this defendant Holly Wood guilty of a capital offense.

Now, because I am giving instructions to you does not mean that you are to assume as true any questions of fact referred to in these instructions. Instead it is left to you to determine what the facts are, and

what the recommended sentence should be. The law of this state provides that the punishment for the capital offense for which you have convicted this [1072] defendant Mr. Wood, is either death by electrocution or life imprisonment, without eligibility for parole. The law also provides that, which of those two punishments should be imposed upon the defendant, depends on whether any aggravating circumstances exist, and if so whether the aggravating circumstances outweigh the mitigating circumstances.

An aggravating circumstance, is a circumstance specified by law with indicates or tends to indicate that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without parole instead of death. The issue at this sentencing hearing concerns circumstances of aggravation and circumstances of mitigation that you should consider and weigh against each other in deciding what the proper punishment is in this case. In making your recommendation concerning what the punishment should be, you must determine whether any aggravating circumstance exists, and, if so, you must determine whether any mitigating circumstance or circumstances exist. In making your determination concerning the existence of aggravating and mitigating circumstances, you should consider the evidence presented at this sentence hearing. You should also consider any evidence that was presented during the guilt phase of the trial that is relevant to the existence of any aggravating or mitigating circumstances.

[1073] The law of this state provides a list of aggravating circumstances, which may be considered

by the jury in recommending punishment, if the jury is convinced beyond a reasonable doubt from the evidence, that one or any such aggravating circumstance exists in this case. The same definitions which I gave to you yesterday on October 20th, 1994, concerning reasonable doubt apply to this matter also.

If your are not convinced beyond a reasonable doubt based on the evidence, that one or more of such aggravating circumstances exist, then the jury must recommend that the defendant's punishment be life imprisonment without parole, regardless of whether there are any mitigating circumstances in the case.

On the list of aggravating circumstances provided by law there are three circumstances which you may consider in this case if you are convinced beyond a reasonable doubt and to a moral certainty, based on the evidence that such circumstances do exist. The fact that I instruct you on such aggravating circumstances or define them to you does not mean that the circumstances or any other aggravating circumstances have been proven beyond a reasonable doubt in this matter. Whether any aggravating circumstances which I instruct you on or define for you have been proven beyond a reasonable doubt based on the evidence is a matter for you and for you alone to determine.

The aggravating circumstances which you may consider in [1074] this case, if you find from the evidence that they may have been proven beyond a reasonable doubt are as follows:

The first one is. The capital offense was committed by a person under sentence of imprisonment. Under sentence of imprisonment means that while serving a term of imprisonment, while under a suspended sen-

tence while on probation or parole or while on work release, furlough or escape or any other type of release or freedom, while or after serving a term of imprisonment, other than unconditioned release and freedom after expiration of term of sentence.

Number two. The defendant was previously convicted of a felony involving the use or threat of violence to the person.

Evidence has been introduced that the defendant Holly Wood was convicted in the Circuit Court of Pike County, Alabama, in case Number CC 84-124 of Assault in the First Degree. A person commits the crime of Assault in the First Degree, if with intent to cause serious physical injury to another person, he causes serious physical injury to any person by means of deadly weapon or dangerous instrument. Serious physical injury is physical injury which creates a substantial risk of death. A deadly weapon is a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious physical injury, and such term includes but is not limited to a pistol, rifle, or shotgun or switch blade knife, gravity knife, stilleto, sword or dagger or any billy, blackjack, bludgeon or [1075] metal knuckles.

Number three. The capital offense was committed while the defendant was engaged in, or was an accomplice in the commission or the attempt to commit burglary in the first degree.

An aggravating circumstance, which the verdict convicting the defendant establishes, was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for the purpose of the sentencing hearing.

Now, as I stated to you before, the burden of proof is on the State to convince each of you, beyond a reasonable doubt, as to the existence of any aggravating circumstance or circumstances considered by you in determining what punishment is to be recommended in this case. This means that before you can even consider recommending that defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least one or more of the aggravating circumstances exist.

In deciding whether the state has proven beyond a reasonable doubt the existence of any given aggravating circumstance or circumstances, you should bear in mind the definition I gave to you yesterday as to reasonable doubt.

The evidence upon which a reasonable doubt about an aggravating circumstance may he based is both the evidence [1076] you have heard in the guilt stage of this trial, and the evidence you have heard in the sentencing phase of this trial. The defendant does not have to disprove anything about an aggravating circumstance. The burden is wholly upon the state to prove such a circumstance or circumstances beyond a reasonable doubt. A reasonable doubt about an aggravating circumstance may arise from all of the evidence, from any part of the evidence or from a lack or failure of the evidence.

You may not consider any aggravating circumstances other than the three on which I have instructed you. You may not consider an aggravating circumstance unless you are convinced by the evidence beyond a reasonable doubt of the existence of that aggravating circumstance in this case.

If you should find that no aggravating circumstance or circumstances has been proven beyond a reasonable doubt to exist in this case, then you must return a verdict recommending defendant's punishment be life imprisonment without parole. In that event you need not concern yourself with the mitigating circumstances in this case.

If you find beyond a reasonable doubt that one or more of the aggravating circumstances on which I have instructed you does exist in this case, then you must proceed to consider and determine the mitigating circumstances.

The law of this state provides a list of some of the mitigating circumstances which you may consider. But that list is not a complete list of the mitigating circumstances you may [1077] consider. I will now read to you a list of some of the mitigating circumstances that you may consider. These include, one, the defendant has no significant history of prior criminal activity. Two, the capital felony was committed while the defendant was the defendant was under the influence of extreme mental or emotional disturbance. Three, the victim was a participant in. the defendant's conduct or consented to the act. Four, the defendant was an accomplice in the capital offense committed by another person, and his participation was relatively minor. Five, the defendant acted under extreme duress under the substantial domination of another person. Six, the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law is substantially impaired.

A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is not the same as his ability to know

right from wrong generally, or to know what he is doing at a given time, or to know what he is doing is wrong. A person may indeed know that doing the act that constitutes a capital offense is wrong and still not appreciate its wrongfulness because he does not fully comprehend or it is not fully sensible to what he is doing or how wrong it is. Further, for this mitigating circumstance to exist the defendant's capacity to appreciate does not have to have been totally obliterated. It is enough that it was [1078] substantially lessened or substantially diminished. Finally this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was substantially impaired, since a person may appreciate his actions of wrong and still lack the capacity to refrain from doing them.

Number even, the age of the defendant at the time of the crime.

A mitigating circumstance does not have to be included in this list of seven that I have read to you in order for it to be considered by you. In addition to the mitigating circumstances previously specified, mitigating circumstances shall include any aspect of defendant's character, or record or any of the circumstances of the offense that defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Where evidence is presented that defendant has an antisocial personality, the defendant's mental or emotional disturbance must be considered as relevant mitigating evidence.

It is the duty of the jury to weigh the mitigating and aggravating circumstances in its decision. The

jury is not free to arbitrarily ignore any factor, positive or negative in arriving at the correct sentence.

Evidence of a difficult family history and of emotional disturbance constitutes relevant mitigating evidence.

[1079] A mitigating circumstance considered by you should be based on the evidence you have heard.

When the factual existence of an offered mitigating circumstance is in dispute, the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. The burden of disproving it is by a preponderance of the evidence, means that you are to consider that mitigating circumstance does not exist unless, taking the evidence as a whole it is more likely than not that the mitigating circumstance does not exist.

Therefore, if there is a factual dispute over the existence of a mitigating circumstance then you should find to consider that mitigating circumstance, unless you find the evidence is such that it is more likely than not that the mitigating circumstance did not exist.

Only an aggravating circumstance must be proven beyond a reasonable doubt. And as I have stated to you many times, the burden is on the State of Alabama to convince you from the evidence beyond a reasonable doubt and to a moral certainty that such an aggravating circumstance did exist.

In reaching your finding concerning the aggravating and mitigating circumstances in this case, and in determining what to recommend that the punishment in this case should be, you must avoid any influence of passion, prejudice or any other arbitrary

factor. Your deliberation and verdict should be [1080] based upon the evidence you have seen or heard, and the law on which I have instructed you. There is no room for the influence of passion, prejudice or any other arbitrary factor.

While it is your duty to follow the instructions which the Court has given to you, no statement, questioning, our question, ruling, remark, or any other expression that I may have made during this trial, either during the guilt phase or during this sentencing hearing is intended to indicate any opinion, or what the facts are or what the punishment should be. It is your responsibility to determine the facts and recommend the punishment, and in doing so, you should not be influenced in any way, by what you may imagine to be my views on such subject.

The process of weighing aggravating and mitigating circumstances against each other in order to determine the proper punishment is not a mechanical process. Your weighing of the circumstances against each other should not consist of merely adding up the number of aggravating circumstances and comparing that number to the total number of mitigating circumstances; The law of this state recognizes that it is possible in at least some situations that one or a few aggravating circumstances might outweigh a larger number of mitigating circumstances. The law of this State also recognizes that it is possible, at least in some situations that a large number of aggravating circumstanced might be [1081] outweighed by one or fewer mitigating circumstances or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case, and you the jury are to decide what weight or

value is to be given to a particular circumstance and determine the sentence in light of all other circumstances in this case. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

In order to bring back a verdict recommending the punishment of death at least ten of your number must vote for death. In other words, a verdict of death must either be unanimous or eleven for death and one for life without parole or ten for death and two for life without parole. Any number less than ten cannot recommend the death penalty.

In order to bring back a verdict recommending a sentence of life imprisonment without parole there must be a concurrence of at least seven of your number for that sentence. In other words, in order for a verdict to be returned recommending imprisonment for life without parole, it must be either unanimous or eleven for life without parole and one for death, or ten for life without parole and two for death, or nine for life without parole and three for death, or eight for life without parole and four for death or seven for life without parole and five for death. Any number less than seven cannot [1082] recommend life without parole.

The fact that the determine of whether ten or more of you can agree to recommend a sentence of death or seven or more of you can agree to recommend a sentence of life imprisonment without parole can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. You should hear and consider the views of your fellow jurors. Before you vote you should carefully weigh, sift and consider the evidence and all of it, realizing that a human life is at stake,

and you should bring to bear your best judgment on the sole issue, which is before you, and that issue being, the issue of whether the defendant should be sentenced to life imprisonment without parole or death.

In addition to the recommendation of either death or life imprisonment without parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count.

Now, ladies and gentlemen, if after a full and fair consideration of all the evidence in this case you are convinced beyond a reasonable doubt and to a moral certainty that at least one aggravating circumstance does exist, and you are convinced that the aggravating circumstance outweighs the mitigating circumstances, your verdict would be, "We the jury recommend the defendant Holly Wood be punished by death. The [1083] vote is as follows." And there is a blank left before the word death and a blank left before the term life without parole, and those two blanks should be filled out with the numerical vote for each one of those potential sentences, and it should be signed by one of your members as foreperson.

However, after a full and fair consideration of all the evidence in this case, you determine no aggravating circumstance exists or that one or more aggravating circumstances exist, but do not outweigh the mitigating circumstances, then your verdict would be, "We the jury recommend that the defendant Holly Wood be punished by life imprisonment without parole. The vote is as follows:" Then there is a blank left before term Life Without Parole, and then there is a blank left in front of the word death, and that should be signed by one of your members as foreperson. And again I emphasize to you the blank should

be filled out with the numerical vote, not who voted which way.

What says the State?

MR. FOLMAR: Satisfied.

THE COURT: What says the defendant?

MR. DOZIER: Satisfied.

THE COURT: Ladies and gentlemen I will now allow you to retire. My same instructions that went to you yesterday. You are not locked in the room. If you wish to take breaks, that is your prerogative. This case in this phase . . . [1087] jury is reflecting this is the verdict that is arrived at by their deliberations.

Again I caution to everybody when I read this verdict I do not want any outbursts or any noise.

"We, the Jury recommend that the defendant Holly Wood be punished by death. The vote is as follows: Ten for death and two life without parole." Signed by Mr. Shackelford the foreperson.

(Jury dismissed.)

THE COURT: Mr. Wood, and counsel for the state and the defendant, the jury during our sentencing hearing has returned a recommendation of death for your conviction of capital murder, that being murder during a burglary in the first degree. Pursuant to the Code, State of Alabama, I am setting a sentencing hearing to be conducted on the 2nd day of December at 9:00 o'clock in this courthouse. I will order a presentence investigation be prepared and copies be distributed to the defense, to the State and to the Court. If there are any objections or any evidence and arguments concerning, as prescribed by the Code, it will be heard on that date.

I further set the date of December 9th, 1994, at 9:00 o'clock, as the date that I will announce my sentence in this case. That will be one week after we have the sentencing hearing pursuant to the Code.

[1100] What is next. Anything else on the presentence report? Let's take that up.

MR. DOZIER: I don't have anything else.

THE COURT: Anything you wish to add to the presentence report that is not contained therein, other than what has been noted so far.

MR. DOZIER: We would like something in that report, as far as Salter is concerned, to show that he was taken in custody in Luverne and brought to Troy and interrogated as an accomplice or whatever in this case.

THE COURT: I note that was brought out as part of the evidence during the course of the trial, and as I have stated and I am stating for the third time, the evidence that was received during the course of the trial is what is being considered as evidence in determining the application of the aggravating, mitigating circumstances to determine the sentence here. This presentence report is on Mr. Woods; it is not for Mr. Salter. But if you wish to point that out in argument or point it out at this time, it is received by the Court, but, again, I state to you, the evidence presented during the course of the trial, during the evidentiary phase, during the sentencing phase, will be considered in its entirety by the Court.

MR. TROTTER: Your honor, with regards to the psychological [1101] reports that this presentence report makes reference to, are those being attached as part of the record along with this report?

THE COURT: Yes, sir. There is two that are there. There is the one that was performed in this case, and there is the one that is dated June 29th, 1992. Both have been attached to the presentence report and both are a part of the record.

Anything else concerning presentence?

MR. DOZIER: No.

THE COURT: Well, according to the statute the next stage is receipt of argument concerning the aggravating and mitigating circumstances, and the procedure is to follow the same procedure and order as we did during the trial. So the state may proceed.

MR. DOZIER: Judge, before we proceed, since this is a capital murder case, we would ask at this time that the defense be given another opportunity to move for a judgment of acquittal and add a new ground to the record.

THE COURT: All right, I will allow that. What is your new ground?

MR. DOZIER: The ground is this. In all the testimony presented at trial it was obvious that the conviction was based entirely on Salter's testimony. There was no other evidence presented by the state, forensic wise or [1106] given in this particular case, we submit to the court that the aggravating circumstances that have been proven, far outweighs any mitigating circumstances that may have been submitted to this court, and considered by this court in the sentencing phase of the bifurcated jury trial that we had, and the jury saw that and considered that, and they made a decision on a recommended sentence in a 10 to 2 vote of that jury, which is a sufficient

amount of that jury to recommend the death penalty in this case.

We submit to the court, based upon the evidence, based upon the jury's decision and based upon the aggravating circumstances, that death is the punishment that should be meted out to this defendant Holly Wood.

THE COURT: Defense.

MR. DOZIER: Judge, I would contend, and the defense would contend, that the facts presented in this case are not sufficient to sustain a capital punishment verdict by the jury, in that the evidence was clear during the course of the trial that Holly Wood and Salter had gotten up early that Morning and started drinking, had continued drinking until they came to Troy, Alabama, that he came here to Troy knowing that he could probably find his girlfriend, Ms. Gosha, with Amp, which even made him, while drinking, made him mad, and when he went to the house, at the time [1107] he went to the house when Ms. Gosha was shot and killed, assuming he went, the evidence is clear that he went there out of rage, heat of passion or whatever. We do know that he was drinking, and there has been no evidence put on whatsoever to show that he was not so intoxicated that he didn't understand the significance of the crime that he was committing.

So I am saying with Salter's testimony in itself knowing that they had been drinking all day, knowing they drank when they came to Troy, knowing that he was mad when left Luverne about the Gosha woman, we contend that the evidence again is not sufficient to sustain a capital punishment verdict.

THE COURT: Any further argument.

MR. TROTTER: Yes, sir, we would like to add the note to what Mr. Dozier just said that one of the statutory grounds for mitigating circumstances are when testimony presented at trial that the defendant does not have the capacity to appreciate the criminality of his conduct or conform his conduct to the terms of the law, that that is to be considered as a statutory mitigating circumstance.

There were several non statutory mitigating circumstances also presented in the sentencing phase of the trial before the jury, and specifically evidence of a difficult family history on the part of the defendant. [1108] The fact that he had lost his mother when he was ten, the fact that he had no father figure in his home, the fact that he had seen his brother killed in a car accident when Holly was fifteen years old, the fact that he was raised by various members of the family, including his older sister. Also the fact that, as reported in the psychological report by Dr. Kirkland, that Holly cannot use abstraction skills much beyond the low average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning, and all these together, with the prior history, which has been reported also in the Department of Corrections' records that Holly had demonstrated problems with anger control and antisocial behavior, yet never had been given any counseling for that during any of his incarcerations, would mitigate any aggravating circumstances in this case, and would require that the proper sentence for case be life in prison without parole and not death.

THE COURT: Anything further.

MR. TROTTER: No, sir.

THE COURT: Mr. Wood, do you wish to say anything at this time?

DEFENDANT WOOD: Yeah, I want to say, if I had committed the offense on Salter's testimony as far as what he done told, they believed from what Salter have told them on [1109] the statement, all these statements what he made against me. Three statements saying that I killed the Gosha girl. How can they say I killed her? What do they have to say that I killed her? Salter done told all kind of lies, testimony, different things, people in the street. How can they say that I killed her? He done made all kind of lies. He got on the witness stand and said his testimony, all that statement he made wasn't true. He perjured right there on the witness stand from the testimony.

THE COURT: Anything else you wish to say, Mr. Wood?

DEFENDANT WOOD: No, that is all I have to say.

THE COURT: Closing by the state?

MR. FOLMAR: Yes, sir, your honor. In response to Mr. Dozier's argument or statements to the court about this defendant being in an intoxicated state, we submit to the court there is absolutely no evidence before this court, at the guilt stage or the sentencing stage of the jury trials, that would indicate that this defendant was intoxicated. On the contrary, Mr. Salter said, if I remember the testimony correctly, Mr. Salter said they had a beer at his mother's house in Luverne and they drank some beer on the way to Troy, and that was the only evidence submitted in this trial about intoxication at all.

[1110] We submit the psychological reports, that he referred to, did classify him into the average range of

intellect, although the classified it as a low average range of intellect, may it please the court, and certainly that would indicate that he had, even though it was in the low range of average, that he had average intelligence.

We would also submit to the court, that the evidence clearly showed that he had a plan, a scheme, a design, a premeditation, based upon his prior conduct with him and this victim of assault. We also submit to the court that he came to Troy, Alabama, on that occasion, and the evidence has established that he was looking for her on that night, and had made statements about the fact that if he found her with Amp he was going to kill them both, and that he had previously stated and made statements to the effect that he had tried to kill this victim on a previous occasion, and he told her that he was stabbing at the other person, but missed; but in fact he was attempting to kill her on that occasion.

We would also submit, may it please the court, that the evidence in this case shows that there was a premeditated scheme and design to kill Ms. Gosha on that occasion, that he went there in the darkness of night, as the evidence showed, that he went into her home and [1111] killed her, and shot her with that shotgun that was introduced into evidence, and that he got out of the truck and took with him, as he went, and took inside of her house, on that occasion, and shot and killed her while she was asleep in the bed. We submit to the Court that that clearly shows the mental operation of this defendant as being premeditated and intentional, and it was not diminished in any way, may it please the court.

THE COURT: Gentlemen, we will reconvene here on December 9th, at 9:00 o'clock, at which time I will

announce and, enter my findings and sentence. Thank you.

(Sentence hearing had on December 9th, 1994, when the defendant and his attorneys Cary Dozier and Frank Ralph, were before the court for pronouncement of sentence upon the defendant)

THE COURT: This is the case of the State of Alabama versus Holly Wood, Circuit Court of Pike County, Alabama, case number CC 94-07. Back On October 20th, in this case, the petit jury returned a verdict of guilty of the capital offense of murder during the course of the offense of Burglary in the first degree. On October 21st, the jury returned a verdict recommending the death penalty by a Verdict of ten to two. On December 2nd, 1994, this court [1119] in the first degree, or an attempt thereof, committed by the defendant.

In accordance with the mandate of Title 13A-5-45, et. seq., of the Code of Alabama, a sentence hearing was conducted by the Court before the jury in this case. At said hearing the State introduced evidence, and the Court finds, that the defendant, prior to the commission of the act made the basis of this case, was previously convicted of a felony involving the use or threat of violence to the person. This prior felony was for a conviction of assault in the first degree. The State further asked the jury to find that the State had proven that the capital offense charged in the indictment, and for which the defendant has been convicted, was committed while the defendant was engaged in the commission of, or an attempt to commit, a burglary in the first degree, a finding that the jury would had to have made to convict the defendant of the capital offense charged. The State also showed, by competent evidence, that the defendant was on

parole at the time of the incident made the basis of this case, and was, then, under sentence of imprisonment.

The defendant presented the testimony of his father, J. P. Wood, and his two sisters, Johnnie Pearl Wood and Lillie Jean Wood, in mitigation. Their testimony showed [1120] that the father did not live with the defendant's family but that he helped provide for them. Their testimony showed that the defendant's mother was the head of the household. The defendant's sisters testified that defendant's mother died when he was 10 years old and that his older sister who was five years older than the defendant, had to become head of the household. The defendant's Sister, Johnnie Pearl Wood, testified that she then raised the family from the time that She was 15 years old. Both of the sisters testified to the hard economic times but also testified that throughout this period that the family was close and that the defendant was always very helpful around the house.

The defendant asked the Court to consider an outpatient forensic evaluation report that was submitted by Karl Kirkland, a licensed psychologist and certified forensic examiner. This evaluation by Dr. Kirkland was conducted following a request for such an evaluation by the defendant's attorneys. The Court granted this request so that a current forensic psychological evaluation be performed to determine the defendant's competency to stand trial and mental state at the time of the offense.

The forensic evaluation report, which was considered by the Court, but not presented to the jury during the [1121] penalty phase, shows that the defendant is functioning in the borderline range of intellect. The report also indicates that the defendant

does not have a mental disorder present that would detract from his ability to appreciate the criminality of his behavior with regard to this specific alleged instant offense. The report also indicates that the defendant was "quite willing to discuss the lack of drugs or alcohol on the day of the offense."

The jury was charged as to the relevant aggravating and mitigating circumstances the jury could consider; and told that it could consider any of the facts and circumstance surrounding the case; was charged that the State has the burden of proving any aggravating circumstances beyond a reasonable doubt; was charged that any aggravating circumstances proven by the State beyond a reasonable doubt at trial by the State which the verdict, convicting the defendant was proven beyond a reasonable doubt at trial should be considered as proven beyond a reasonable doubt for the purposes of the sentencing hearing; that if the jury found no aggravating [1122] circumstances existed in the case that it was required to return a verdict recommending to the trial court that the penalty be life imprisonment without parole; was charged that if it found one or more of the aggravating circumstances existing, but found that those aggravating circumstances did not outweigh the mitigating circumstances, that the law required the jury to return an advisory verdict recommending to the Court that the penalty be life imprisonment without parole; was charged that if it found one or more aggravating circumstances existed and that those aggravating circumstances outweighed the mitigating circumstances proven by the State beyond a reasonable doubt that it should return a verdict recommending to the Court that the penalty be death, and that the jury should not allow passion, prejudice, or emotion for or against the State or the defendant to

enter into its deliberations and verdict in any manner whatsoever. The jury was also charged that an evaluation of aggravating and mitigation circumstances was not a mere mathematical balancing and that the jury was cautioned that they must evaluate such circumstances from a qualitative and not a mere quantitative standpoint. Upon the jury being charged, both the district attorney and the defendant's attorney advised the Court they they were satisfied with the charge and that no exceptions were taken and the jury retired to deliberate its verdict.

As previously stated in this Order, the jury, upon reaching a verdict was returned to open court and in the [1123] presence of the defendant, his attorney and the district attorney, with the clerk of the Circuit Court of Pike County, Alabama, in attendance returned its verdict recommending to the Court that the sentence imposed herein be death. Upon a polling of the jury, the Court verified the accuracy of the verdict and verified that ten jurors did in fact vote in favor of the penalty of death and that two jurors voted in favor of the penalty of life in prison without the possibility of parole. The Court finds the verdict and recommended sentence was not a product of emotions, sympathy or prejudice.

In accordance with the mandate of Title 13A-5-47 of the Code of Alabama, the Court makes the following findings in regard to the aggravating circumstance set out by Title 13A-5-49. The Court finds (1) that capital offense was committed by a person under a sentence of imprisonment; (2) that the defendant had not been previously convicted of another capital offense, but had been previously convicted of one felony involving the use of violence to the person; (3) the act alleged committed by the defendant in the

instant case was not one that created a great risk of death to many persons; (4) the capital offense was committed while the defendant was engaged in the commission of or an attempt to commit or flight after committing burglary or specifically burglary [1124] in the first degree; (5) the capital offense was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (6) the capital offense was not committed for pecuniary gain; (7) the capital offense was not committed to disrupt or render the lawful exercise of any governmental function or the enforcement of laws; (8) the capital offense was not especially heinous, atrocious or cruel when compared to other capital offenses and the Court makes this finding based on the Interpretation of the aggravating circumstances as made by the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in defining the heinous, atrocious or cruel aggravating circumstance.

This Court makes the following findings under Title 13A-5-51, Code of Alabama, in regard to mitigating circumstances; the Court finds the following: (1) the defendant has a significant history of prior criminal activity and that it was proven that he had one prior felony conviction involving use of violence to the person; (2) the defendant was not under the influence of extreme mental or emotional disturbances during the commission of the capital offense charged in this case; (3) the victim was not a participant in the defendant's conduct nor did the victim consent thereto; (4) the defendant was not merely an accomplice in the capital [1125] first degree on an attempt thereof, also committed by the defendant.

After due consideration of all the matters that were presented to the Court during this hearing, both in

mitigation and aggravation, and taking it into consideration all of the matters that are properly before the Court-as herein and above stated in this Order, this Court does now find and is convinced beyond a reasonable doubt that the aggravating circumstances as shown above and brought before the Court far outweigh the mitigating circumstances shown to the Court, that said aggravating circumstances outweigh the mitigating circumstances in all regards and that they are sufficient in both quantity and quality to more than uphold the jury's verdict recommending the death penalty in this case. It is, therefore, the judgment of this Court that Holly Wood is sentenced to death by electrocution by a sufficient current of electricity passing through his body until he is dead. That the date of execution shall be set by the Alabama Supreme Court.

May God have mercy on your soul.

That ends this hearing.

MR. DOZIER: (Approaches bench and gives court a document.)

THE COURT: For the record, I have been handed by defense attorney Dozier a motion for judgment of acquittal, or in

IN THE CIRCUIT COURT OF PIKE COUNTY, ALABAMA

Case No.: CC 94-07

STATE OF ALABAMA,

Plaintiff,

vs.

HOLLY WOOD,

Defendant.

ORDER OF THE COURT ON IMPOSITION OF SENTENCE

The Defendant in the above-styled case, Holly Wood, was charged by indictment returned by the grand jury of Pike County, Alabama, during its November, 1993 session, with the capital offense in violation of Title 13A-5-40(a)(4) of the Code of Alabama. Specifically, the defendant, Holly Wood, was charged, with capital offense of murder by the defendant during a burglary in the first degree, or an attempt thereof, committed by the defendant. The case was tried in October, 1994, and the defendant was convicted of the charge specified.

This case came to be heard before the Court and a jury of twelve men and women (and two alternate jurors who were discharged according to law) duly impaneled and sworn as required by law; where upon the principle jurors after hearing the evidence, and the Court's charges to the applicable law, and upon consideration of law and the evidence, found the defendant guilty of the capital offense of murder by the defendant during a burglary in the first degree,

or an attempt thereof, committed by the defendant as charged in the indictment in this case.

The Court announced the jury verdict on October 20, 1994, and on October 21, 1994 commenced, without objection, a punishment phase hearing before the same jury as required by Title 13A-5-46 of the Code of Alabama. After hearing evidence during the punishment phase, the jury was again charged as to the applicable law, the Court advising said jury that, if the mitigating circumstances outweighed any aggravating circumstances proven by the State beyond reasonable doubt, then punishment would be life imprisonment without eligibility for parole, but if the aggravating circumstances proven by the State beyond a reasonable doubt outweighed the mitigating circumstances as shown by the Court's charge, then the verdict should be death.

The jury was further charged that they must avoid any influence from passion, prejudice, or sympathy to enter into their verdict one way or the other. Both the State and the defendant's attorney again advised the Court they were satisfied with the Court's charge to the jury. After due deliberation, the jury returned a verdict fixing the defendant's punishment at death in accordance with Title 13A-5-46, the body of said verdict stated that the vote was 10 votes in favor of death and two for life without parole. According to Title 13A-5-46(f) the decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors. Upon the said jury verdict being returned and having been read in open court, the Court set a formal sentencing hearing for December 2, 1994, at 9:00 a.m.

At the sentencing hearing conducted before the Court, the defendant, and his attorneys, and the

district attorney, Joel Folmar, were present. No further evidence or testimony was offered other than the presentence report ordered to be prepared by the probation and parole office; and an out-patient forensic evaluation report was offered by the defendant; and argument was made by both parties.

FINDINGS OF FACT BY THE COURT FROM THE EVIDENCE AND TESTIMONY PRESENTED DURING THE GUILT PHASE OF THE TRIAL

Upon consideration of the evidence and testimony presented before the Court during the guilt phase of the trial in this case, the Court hereby finds as follows:

Ruby Lois Gosha, a 34 year old female was murdered by a shotgun blast to the head while she was asleep in her bed at approximately 9:00 p.m., on September 1, 1993.

At trial, evidence and testimony was produced to the effect, and the Court finds, that the victim in this case, Ruby Lois Gosha, was a victim of a homicide and that the death of the said Ruby Lois Gosha was caused by a gunshot wound to the head.

The testimony showed that Ms. Gosha has recently been having domestic problems with the defendant who is the father of one of her children. The testimony showed that the defendant and Ms. Gosha had been involved in an incident in August, 1993, in which the defendant cut Ms. Gosha on the arm. Testimony showed that on August 31, 1993 at approximately 10:00 a.m., the defendant had threatened to "get" Ms. Gosha during another altercation that had taken place behind her residence which is located on 505 Park Street. Annie Ruth

Gosha, the victim's mother, was a witness to that incident and testified to the facts of that incidence.

The testimony showed that on September 2, 1993, at approximately 1:00 a.m., the defendant was located in a utility house near his father's residence in Luverne, Alabama. The defendant was taken into custody by law enforcement officers. The defendant's cousin, Calvin Salter, was with the defendant at the time of the defendant's arrest. The defendant was read his Miranda rights at the Luverne Police Department by Captain Don Brown of the Troy Police Department.

The testimony indicated that the defendant was placed in a police vehicle with investigator Lewis Fannin of the Troy Police Department for transport to the Troy Police Department from the Luverne Police Department. Investigator Fannin reported that he did not ask any questions of the defendant while in route. Investigator Fannin reported that the defendant himself was asking questions and was at times quite belligerent. According to the testimony of Investigator Fannin, the defendant accused police of trying to "dump a load of shit on him." Investigator Fannin testified that at one point the defendant asked him "you motherfuckers think I'm crazy, think I be going in a house shooting some woman in the head while she was asleep." Investigator Fannin reported that he did not respond to these remarks. Investigator Fannin further testified that at no time has anyone mentioned the locations of the victim's wound or where her body had been found in the house.

The Court, from the evidence and testimony, further finds that Calvin Salter was questioned by investigators and stated that he and the defendant

has been in Springhill, Alabama, on September 1, 1993, riding around in the defendant's father's pickup truck. Salter testified that later during the night of September 1, 1993, the defendant told him that he wanted to go to Ms. Gosha's house to see if she was laid up with someone named "Amp", and if so, that the defendant was going to kill them both. Salter testified that he and the defendant arrived on Park Street in Troy, Alabama, and that Wood pulled a shotgun from under the truck seat and then left for the house. Salter testified that he then went to a pay telephone in the Parklane Shopping Center in Troy, Alabama, and called his girlfriend. Salter testified that he then went back to the pickup truck and that the defendant came back and then left for the house again shortly afterwards. Salter testified that he returned to the pay telephone, that a few minutes later he heard a noise like a shotgun and when he returned to the truck the defendant was there. Salter further testified that the defendant told him "I shot her in the head, blowed her brains out and all she did was wiggle; she was lying in the bed." Salter testified that he drove the two of them back to Luverne and that the defendant wanted Salter to spend the night with him. Salter testified that after they arrived in Luverne, just below the defendant's father's house, the defendant and Salter walked a short distance into a wooded area behind the defendant's residence. There they placed the shotgun on the ground and covered it with leaves.

Salter testified that investigators went with him to this area and he showed them where the defendant had placed the shotgun. Testimony indicated that the shotgun was found under some leaves by the police. Testimony indicated that the weapon was identified in Court as a Harrington and Richards 12 gauge single

shotgun. Testimony indicated that Salter immediately identified the shotgun as being the weapon that the defendant had earlier used to kill Ms. Gosha. Testimony indicated that there was a chain with a lock on the stock of the shotgun. Testimony indicated that the defendant's father used this chain to secure the gun under his truck seat.

The Court, from the evidence and testimony, further finds that on September 3, 1993, a post mortem examination was performed on the body of Ruby Lois Gosha at the Alabama Department of Forensic Sciences in Dothan, Alabama by Dr. Alfredo Paredes, state medical examiner. Testimony indicated that the victim sustained a major injury to her body which was a perforating shotgun wound to her face. The testimony further indicated that the entrance wound was three and one quarter inches in front of the right ear lobe. Dr. Paredes testified that Ruby Lois Gosha died as a result of a shotgun wound to her face.

The Court, based upon the evidence and testimony, finds that the defendant, Holly Wood, intentionally caused the death of the victim, Ruby Lois Gosha, during a burglary in the first degree, or an attempt thereof, committed by the defendant.

FINDINGS IN REGARD TO THE PUNISHMENT PHASE OF THE TRIAL IN THIS CAUSE

In accordance with the mandate of Title 13A-5-45, et. seq., of the Code of Alabama, a sentence hearing was conducted by the Court before the jury in this case. At said hearing the State introduced evidence, and the Court finds, that the defendant, prior to the commission of the act made the basis of this case, was previously convicted of a felony involving the use

or threat of violence to the person. This prior felony was for a conviction of assault in the first degree. The State further asked the jury to find that the State had proven that the capital offense charged in the indictment, and for which the defendant has been convicted, was committed while the defendant was engaged in the commission of, or an attempt to commit, a burglary in the first degree, a finding that the jury would had to have made to convict the defendant of the capital offense charge. The State also showed, by competent evidence, that the defendant was on parole at the time of the incident made the basis of this case," and was, then, under sentence of imprisonment.

The defendant presented the testimony of his father, J.P. Wood, and his two sisters, Johnnie Pearl Wood and Lillie Jean Wood, in mitigation. Their testimony showed that the father did not live with the defendant's family but that he helped provide for them. Their testimony showed that the defendant's mother was the head of the household. The defendant's sisters testified that defendant's Mother died when he was 10 years old and that his older sister who was five Years older than the defendant, had to become head of the household. The defendant's sister, Johnnie Pearl Wood, testified that she then raised the family from the time that she was 15 years old. Both of the sisters testified to hard economic times but also testified that throughout this period that the family was close and that the defendant was always very helpful around the house.

The defendant asked the Court to consider an out-patient forensic evaluation report that was submitted by Karl Kirkland, a licensed psychologist and certified forensic examiner. This evaluation by Dr. Kirkland

was conducted following a request for such an evaluation by the defendant's attorneys. The Court granted this request so that a current forensic psychological evaluation be performed to determine the defendant's competency to stand trial and mental state at the time of the offense.

The forensic evaluation report, which was considered by the Court but not presented to the jury during the penalty phase, shows that the defendant is functioning in the borderline range of intellect. The report also indicates that the defendant does not have a mental disorder present that would detract from his ability to appreciate the criminality of his behavior with regard to this specific alleged instant offense. The report also indicates that the defendant was "quite willing to discuss the lack of drugs or alcohol on the day of the offense."

The jury was charged as to the relevant aggravating and mitigating circumstances the jury could consider; and told that it could consider any of the facts and circumstances surrounding the case; was charged that the State has the burden of proving any aggravating circumstances beyond a reasonable doubt; was charged that any aggravating circumstances proven by the State beyond a reasonable doubt at trial by the State which the verdict convicting the defendant was proven beyond a reasonable doubt at trial should be considered as proven beyond a reasonable doubt for the purposes of the sentencing hearing; that if the jury found no aggravating circumstances existed in the case that it was required to return a verdict recommending to the trial court that the penalty be life imprisonment without parole; was charged that if it found one or more aggravating circumstances existing but found that those aggra-

vating circumstances did not outweigh the mitigating circumstances that the law require the jury to return an advisory verdict recommending to the Court that the penalty be life imprisonment without parole; was charged that if it found that one or more aggravating circumstances existed and that those aggravating circumstances outweigh the mitigating circumstances proven by the State beyond a reasonable doubt that it should return a verdict recommending to the Court that the penalty be death; and that the jury should not allow passion, prejudice, or emotion for or against the State or the defendant to enter into its deliberations and verdict in any manner whatsoever. The jury was also charged that an evaluation of aggravating and mitigating circumstances was not a mere mathematical balancing and that the jury was cautioned that they must evaluate such circumstances from a qualitative and not a mere quantitative standpoint. Upon the jury being charged, both the district attorney and the defendant's attorney advised the Court that they were satisfied with the charge and that no exceptions were taken and the jury retired to deliberate its verdict.

As previously stated in this Order, the jury, upon reaching a verdict was returned to open court and in the presence of the defendant, his attorney and the district attorney, with the clerk of the Circuit Court of Pike County, Alabama, in attendance returned its verdict recommending to the Court that the sentence imposed herein be death. Upon a polling of the jury, the Court verified the accuracy of the verdict and verified that ten jurors did in fact vote in favor of the penalty of death and that two jurors voted in favor of the penalty of life in prison without the possibility of parole. The Court finds the verdict and recommended

sentence was not a product of emotions, sympathy or prejudice.

FINDINGS OF FACT BY THE COURT FROM THE PUNISHMENT PHASE IN THE SENTENCE HEARING CONDUCTED BY THE COURT

In accordance with the mandate of Title 13A-5-47 of the Code of Alabama, the Court makes the following findings in regard to the aggravating circumstances set out by Title 13A-5-49. The Court finds (1) that the capital offense was committed by a person under a sentence of imprisonment; (2) that the defendant had not been previously convicted of another capital felony, but had been previously convicted of one felony involving the use of violence to the person; (3) the act alleged committed by the defendant in the instant case was not one that created a great risk of death to many persons; (4) the capital offense was committed while the defendant was engaged in the commission of or an attempt to commit or flight after committing burglary or specifically burglary in the first degree; (5) the capital offense was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (6) the capital offense was not committed for pecuniary gain; (7) the capital offense was not committed to or the enforcement of laws; (8) the capital offense was not especially heinous, atrocious or cruel when compared to other capital offenses and the Court makes this finding based on the interpretation of the aggravating circumstances as made by the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in defining the heinous, atrocious or cruel aggravating circumstance.

This Court makes the following findings under Title 13A-5-51, Code of Alabama, in regard to

mitigating circumstances; the Court finds the following: (1) the defendant has a significant history of prior criminal activity and that it was proven that he had one prior felony conviction involving use of violence to the person; (2) the defendant was not under the influence of extreme mental or emotional disturbances during the commission of the capital offense charged in this case; (3) the victim was not a participant in the defendant's conduct nor did the victim consent thereto; (4) the defendant was not merely an accomplice in the capital offense committed by another person but was the principle in said offense; (5) the defendant did not act under extreme duress or under the substantial domination of another person; (6) the defendant did have the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law, there being no evidence or testimony to show that his said capacity was substantially impaired; (7) the defendant was 34 years of age at the time of the commission of the crime charged and the Court finds that this was not a mitigating circumstance.

In addition to the above, the Court has considered the evidence and testimony presented to the jury and to the Court in regard to the defendant's background and character as the same pertains to the mitigating circumstances that should be properly considered by the Court.

The Court finds that the jury in this case was not emotionally influenced with passion, prejudice or other arbitrary factors in arriving at its findings of guilt to the capital offense and to the recommendation of punishment by death.

The Court makes the further finding as previously set out that the defendant did murder the victim

Ruby Lois Gosha during the commission of a burglary in the first degree on an attempt thereof, also committed by the defendant.

After due consideration of all the matters that were presented to the Court during this hearing, both in mitigation and aggravation, and taking it into consideration all of the matters that are properly before the Court as herein and above stated in this Order, this Court does now find and is convinced beyond a reasonable doubt that the aggravating circumstances as shown above and brought before the Court far outweigh the mitigating circumstances shown to the Court, that said aggravating circumstances outweigh the mitigating circumstances in all regards and that they are sufficient in both quantity and quality to more than uphold the jury's verdict recommending the death penalty in this case. It is, therefore, the judgment of this Court that Holly Wood is sentenced to death by electrocution by a sufficient current of electricity passing through your body until you are dead. That the date of the execution shall be set by the Alabama Supreme Court.

Done and Ordered this the 9th day of December 1994.

/s/ Robert W. Barr
ROBERT W. BARR, Circuit Judge

COURT OF CRIMINAL APPEALS
OF ALABAMA

CR-94-0481

HOLLY WOOD

v.

STATE

July 3, 1996
Rehearing Denied Jan. 17, 1997

LONG, Judge.

The appellant, Holly Wood, was convicted of murder made capital because it was committed during the course of a burglary in the first degree, *see* § 13A-5-40(a)(4), Ala.Code 1975. The jury, by a vote of 10 to 2, recommended a sentence of death, and the trial court accepted the jury's recommendation and sentenced the appellant to death by electrocution.

The state's evidence tended to show the following: On the evening of September 1, 1993, the appellant entered the Troy residence of Annie Gosha and shot and killed Mrs. Gosha's daughter, Ruby Gosha, with whom the appellant had formerly had a relationship and by whom the appellant had had a child.

Annie Gosha testified that on September 1, 1993, Ruby Gosha and Ruby's children were living with her at her house in Troy. Before moving in with her mother, Ruby had lived with the appellant in Enter-

prise, until their relationship ended. At around 5:00 p.m. on September 1, the appellant arrived uninvited at Mrs. Gosha's house, purportedly to bring Ruby some cigarettes and diapers for his child. Mrs. Gosha testified that the appellant and Ruby began arguing and that Ruby told the appellant to "go on and leave her alone, to take his cigarettes and [diapers] and give them to somebody else, because it was over between them." (R. 418.) Mrs. Gosha stated that she also told the appellant to leave her property and to never come back. According to Mrs. Gosha, when the appellant left her house, he told Ruby that he would "get" her some day. (R. 420.)

Mrs. Gosha also testified that Ruby had told her that one night approximately two weeks before September 1, as she sat in her car, the appellant slipped up behind her and cut her on the arm or wrist, causing her to lose the function of two fingers.

At about 9:00 p.m. on the night of September 1, Mrs. Gosha and Ruby retired to separate rooms. Mrs. Gosha testified that as she was lying in bed watching television, she heard a "pop" or what sounded like a "firecracker shot." (R. 424-25.) She then went through Ruby's bedroom into the kitchen, where she saw that the door to the outside was open. When she returned to Ruby's bedroom, she found Ruby lying in bed. Ruby had been shot; there was a gunshot wound near her eye and one near her cheek. Mrs. Gosha then telephoned the police and an ambulance. Paramedics transported Ruby to the Edge Regional Medical Center emergency room in Troy, where Ruby was pronounced dead.

Willie Gosha, Ruby's brother and Annie Gosha's son, testified that he was also in Mrs. Gosha's house on the evening of September 1. He stated that as he

was sitting on the bed in his room, he heard a door open and heard someone "creep through" it. (R. 440.) Shortly thereafter, he heard what sounded like a gunshot and then heard someone moving quickly back through the door.

Doctor Alfredo Paredes, a medical examiner for the Alabama Department of Forensic Sciences, performed an autopsy on Ruby Gosha. He testified that he recovered several lead shot pellets from the victim's head. He determined that the cause of death was a shotgun wound to the face that fractured the victim's skull, injuring her brain. Paredes testified that he also found a recent cut and recent bruises on the victim's palm and on the back of her left hand, two recent trauma-induced scars on her right forearm, a recent scar on her left forearm, and a recent scar on her left upper arm.

Calvin Salter, the appellant's cousin, testified that a few days before September 1, 1993, he went with the appellant to Annie Gosha's house to deliver some diapers to Ruby Gosha but that both Ruby and her. mother told the appellant to leave. Salter testified that later that same day, he and the appellant saw Ruby at a shopping center. According to Salter, the appellant spoke with Ruby at that time, but Salter slid not know what they talked about. Salter testified that sometime between 7:00 p.m. and 8:00 p.m. on September 1, the appellant came by his mother's house in Luverne and picked him up. The appellant was driving his father's pickup truck. The appellant and Salter then drove to Troy, with Salter driving. They drove past the Gosha residence and stopped on a nearby street, where the appellant left the truck and told Salter to circle the block. Salter circled the block and parked the truck, and shortly thereafter,

the appellant returned to the truck. An automobile driven by a man named Amp went by, and the appellant told Salter to follow it. Salter testified that the appellant told him that if he caught Ruby and Amp together, he would kill Ruby. The appellant and Salter followed Amp's car until it passed the Gosha residence. The appellant then directed Salter to drive slowly toward the Gosha house, and when they neared the house, the appellant had Salter stop the truck. Salter testified that the appellant then took a 12-gauge shotgun from the gun rack of the truck, stuck it down his pants leg, covered it with his shirt, left the truck, and walked toward the Gosha house.

Salter testified that he parked the truck at a nearby apartment complex and made a telephone call at a public pay telephone. After making the call, he said, he began walking back to the truck, and the appellant, who was standing in the street behind the Gosha house, called out to him. Salter walked up to him, and the appellant said that he did not see Ruby at the house but that he was going back up to the house anyway. The appellant then walked toward the house again, and Salter went back to the pay phone and made another call. Salter testified that when he hung up the telephone, he heard a gunshot and returned to the truck. When he arrived at the truck, the appellant was sitting in it. The appellant then said to Salter, "Let's go to Luverne." (R. 495.)

Salter testified that as he began the drive to Luverne, the appellant told him that he had shot Ruby while she was lying in bed asleep. Salter stated that the appellant said: "I shot that bitch in the head, and [blew] her brains out and all she did was wiggle." (R. 495.) He stated that the appellant then began throwing 12-gauge shotgun shells out the window.

Salter testified that the appellant told him that he knew he had killed Ruby and that the police would be coming after him.

When Salter and the appellant arrived in Luverne, they went to the appellant's father's house. The appellant took the shotgun from the truck, and he and Salter walked to a nearby wooded area, where they buried the gun under some leaves. They then slept in a shed near the appellant's father's house.

Salter testified that the appellant had tole him that sometime before the shooting he had attempted to stab Ruby in the heart but that Ruby had thrown her arm up to protect herself, and he had stabbed her in the arm instead.

Luverne Police Officer Clifton Wells testified that late on the night of September 1, 1993, he located a vehicle parked at the appellant's father's house that matched a description he had received from a "be-on-the-lookout" bulletin from the Troy Police Department. After the appellant's father told Wells that the appellant lived in the shed next to his house, Wells arrested the appellant there. Wells transported the appellant to the Luverne Police Department and placed him in a cell. Troy Police Office] Donald Brown entered the cell, informed the appellant of his. *Miranda* rights, and performed a gunshot residue test on the appellant's hands. After the test was performed the appellant was escorted from the depart meet by Troy Police Officer Lewis Fannin Wells testified that he was in the appellant's presence from the time the appellant was arrested until he was escorted from the department by Fannin, and that neither he not any other officer ever told the appellant any details of the crime.

Officer Fannin testified that he transported the appellant from the Luverne Police Department to the Troy Police Department and that he engaged in no conversation with the appellant during the trip, but that the appellant stated the following to him during the trip: "You motherfuckers must think I am crazy. What do I look [like] going in somebody's house shooting them in the head while they are asleep?" (R. 713.)

Troy Police Officer Donald Brown testified that Calvin Salter was in the shed after the appellant was arrested. According to Brown, later on the night that the appellant was arrested, Salter led him and other officers to a wooded area near the shed, where, Brown said, they found a shotgun under some leaves.

Joe Saloom, a forensic scientist for the Alabama Department of Forensic Sciences, examined the shotgun recovered near the shed and the shotgun shell wadding and lead shot pellets found in the victim's head. Saloom testified that he found residue in the barrel of the shotgun, which indicated that it had not been cleaned since it was last fired. He determined that it was a 12-gauge single-shot Herrington and Richardson shotgun. Saloom testified that the wadding found in the victim's head was a "combination wad and shot column, or shot protector, . . . located inside a shot shell to hold the shot and cushion it from the detonation," and that it was expelled upon firing. (R. 804.) He testified that the wadding was a 12-gauge type and was consistent with the type of columns and wadding used in Remington shotgun shells and with the type of ammunition used in the recovered shotgun. He also determined that the pellets recovered from the

victim's head were consistent in size and weight with "number 6 shot from a shotgun shell." (R. 805.)

I

The appellant contends that the state used its peremptory challenges against prospective jurors in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79,106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The appellant specifically attacks the prosecutor's strikes of black veniremembers A.B. (juror number 17), J.G. (juror number 46), C.B. (juror number 73), S.N. (juror number 95), A.R. (juror number 115), S.S. (juror number 118), S.S. (juror number 119), E.T. (juror number 133), M.T. (juror number 134), and A.U. (juror number 140).

The appellant alleges that the prosecutor stated he struck veniremembers A.B., A.R., S.S. (juror number 119), E.T., M.T., and AU. "because they had relatives or friends who had been convicted of a crime," appellant's brief at 20, but that the prosecutor failed to strike two white veniremembers who indicated on the juror questionnaire that they had relatives who had been prosecuted. The appellant asserts that this constituted disparate treatment. However, "[a]s long as one reason given by the prosecutor for the strike of a potential juror is sufficiently race-neutral, a determination concerning any other reason given need not be made." *Johnson v. State*, 648 So.2d 629, 632 (Ala.Cr. App.1994). The appellant has not attacked the additional reasons given by the, prosecutor for striking these veniremembers, which are listed below:

1. A.B. indicated that she did not want to serve on the jury because she had a dental appointment.

2. A.R. indicated that he did not want to serve on the jury; he stated that he needed to be at work so that he could earn the money, to meet his child support obligations.

3. S.S. (juror number 119) had had contact with the police department under what was logged by the department as "suspicious circumstances."

4. E.T. indicated that she did not want to serve on the jury; she stated that "she doesn't want to do none of this" and indicated on her jury questionnaire that she feared for her safety and the safety of her family if she served. She was also an alcoholic.

5. M.T. did not want to serve on the jury because he was a college student and was concerned about missing exams.

6. A.U. was a correctional officer who stated that he was not opposed to parole, did not believe in an "eye for an eye," and did not believe the courts were too lenient in sentencing criminals; the prosecutor was concerned that he had become sympathetic to the prisoners he was guarding.

> "The trial court evaluates an objection to the use of peremptory challenges under the three-step analysis set forth in *Batson*. First, as we have said, a defendant must make a prima facie showing that the state has exercised a peremptory challenge or challenges on the basis of race or gender. Second, once a prima facie showing has been made, the burden shifts to the state to articulate a race or gender-neutral explanation for striking the prospective jurors in question that is related to the case to be tried. *Batson*, 476 U.S. at 98 [106 S.Ct. at 1723-24]. The United States Supreme Court recently stated in *Purkett*

> *v. Elem*, 514 U.S. 765, 115 S.Ct. 1769 [131 L.Ed.2d 834] (1995), that the second step does not demand an explanation that is persuasive or even plausible. It stated that a legitimate explanation is not necessarily one that must make sense, but one that does not deny equal protection. At this step of the inquiry, the issue is facial validity of the prosecutor's explanation, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed neutral. *Id.*, at 768, 115 S.Ct. at 1771. When the defendant challenges as pretextual the prosecutor's explanations as to a particular venireperson, the inquiry becomes factual in nature and moves to step three. At this step the trial court must resolve the factual dispute, and whether the prosecutor intended to discriminate is a question, of fact. *Hernandez v. New York*, 500 U.S. 352, 364-65, 111 S.Ct. 1859 [1868-69, 114 L.Ed.2d 395] (1991). In the third step, the trial court must determine whether the defendant has met his burden of proving purposeful discrimination. At this stage, the trial court must consider the persuasiveness of the explanations, and it is also at this stage that 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.' *Purkett*, 514 U.S. at 768, 115 S.Ct. at 1771."

Bush v. State, 695 So.2d 70, 96 (Ala.Cr.App. 1995). "Since the release of *Purkett* a party's burden of proving that strikes were not violative of *Batson* is not as great as it was before the release of *Purkett*." *Trawick v. State*, 698 So.2d 151, 157 (Ala.Cr.App. 1995).

Here, as in *Bush*, the explanations were not "implausible or fantastic." Because the reasons given for striking veniremembers A.B., A.R., S.S. (juror number 119), E.T., M.T., and A.U. included race-neutral reasons, we are not required to address the reasons the appellant challenges as discriminatory.

The appellant alleges that the prosecutor stated that he struck veniremembers A.B., C.B., S.N., A.R., and S.S. (juror number 118) "because they were basically opposed to the death penalty and did not believe in an eye for an eye." Appellant's brief at 20. He further alleges that the prosecutor stated that he struck veniremember J.G. "because he was opposed to the death penalty based on religious beliefs." Appellant's brief at 21. The appellant asserts that this reason is not a race-neutral reason. However, it is well-settled that opposition to the death penalty is a race-neutral reason. *Jackson v. State*, 640 So.2d 1025, 1037 (Ala.Cr.App. 1992); *Carroll v. State*, 599 So.2d 1253, 1258 (Ala.Cr.App.1992), *aff'd*, 627 So.2d 874 (Ala. 1993), *cert. denied*, 510 U.S. 1171, 114 S.Ct. 1207, 127 L.Ed.2d 554 (1994); *McGahee v. State*, 554 So.2d 454, 461 (Ala.Cr.App.), *aff'd*, 554 So.2d 473 (Ala. 1989). With respect to J.G., the fact that the trial judge had denied the prosecutor's challenge for cause as to this veniremember is irrelevant to the present *Batson* inquiry, because "[a] prosecutor's explanation for his exercise of a peremptory strike 'need not rise to the level of a challenge for cause.' *Ex parte Branch*, 526 Sold [609,] at 623 [(Ala.1987)]." *Ford v. State*, 628 Sold 1068, 1070 (Ala.Cr.App.1993).

Finally, with respect to veniremember A.B., the appellant alleges that the prosecutor stated that he struck A.B. because "[she] touched the appellant as she passed him [as she walked by him to get her jury

questionnaire]." Appellant's brief at 21. The appellant alleges that this was not a race-neutral reason because when A.B. "was questioned on voir dire as to whether or not she knew the appellant, she indicated she did not." Appellant's brief at 21. We need not address this reason, however, because we have already determined that the additional reason given by the prosecutor for striking A.B. that she did not want to serve on the jury because she had a dental appointment was race-neutral. *Johnson, supra.*

We find no violation of *Batson* in this case.

II

The appellant contends that the evidence was insufficient to support his conviction for capital murder because, he says, the state failed to prove the elements of burglary in the first degree. § 13A-7-5, Ala.Code 1975. The appellant specifically argues that the state failed to prove that he "unlawfully enter[ed] or remained] unlawfully" in Mrs. Gosha's house because, he argues, "no evidence [was] presented that the deceased did not . . . invite the Defendant to speak with her again" when they spoke at the shopping center a few days before the crime, appellant's brief at 25, and because no evidence was presented that the appellant had broken into the Gosha house.

"A person 'enters or remains unlawfully' in or upon premises when he is not licensed, invited or privileged to do so." § 13A-7-1(4), Ala.Code 1975. In determining whether the state has made a prima facie case, our concern is not with what the evidence *does not show*, but with what the evidence *does show*. Here, the evidence showed that the victim had told the appellant to leave her, alone, that the victim and her mother had told the appellant to leave their

property, and that her mother told him never to return. Furthermore, Mrs. Gosha, the victim's mother, specifically testified that if the appellant was ever on her property after she told him never to return; it was not by her invitation.

As to whether the appellant broke into the Gosha house, "[t]he common law requirement for a breaking has been omitted by the new criminal code." *Hollins v. State*, 415 So.2d 1249, 1253 (Ala.Cr.App.1982). *See also* Commentary to §§ 13A-7-5 through 13A-7-7, Ala.Code 1975 ("To establish burglary the prosecution must prove: (1) The intruder 'entered or remained unlawfully,' as that term is defined in § 13A-7-1(4). There is no requirement that a technical breaking be established."). The evidence presented by the state was sufficient to prove a prima facie case of burglary in the first degree and there was therefore sufficient evidence to support the appellant's conviction for capital murder.

III

The appellant contends that the trial court erred in allowing the victim's mother to testify that approximately two weeks before the murder, the victim had told her that the appellant "slipped up behind her and cut her on the arm." (R. 422.) Error in the admission of this testimony, if any, was harmless. "[T]estimony that may be inadmissible may be rendered harmless by prior or subsequent lawful testimony to the same effect or from which the same facts can be inferred." *White v. State*, 650 So.2d 538, 541 (Ala.Cr. App.1994). After the victim's mother testified, Calvin Salter testified, without objection, that the appellant had told him that before the murder that he had once attempted to stab the victim in the heart but that she had thrown her arm up to

protect herself and he had stabbed her in the arm instead.

IV

The appellant complains of error regarding the admission into evidence of the statement he made to Troy Police Officer Lewis Fannin while being transported from Luverne, where he was arrested, to the Troy Police Department. This statement was the object of the appellant's motion to suppress, which the trial court denied. On appeal, the appellant styles this issue as a challenge to the denial of his motion to suppress; however, it appears from the substance of his argument in his brief to this court that he is actually challenging the admission of certain testimony at trial concerning the statement. Officer Fannin testified at trial that the appellant told him the following when he was being transported to the police department:

> "'You motherfuckers must think I am crazy. What do I look [like] going in somebody's house shooting them in the head while they are asleep?'"

(R. 713.) Fannin also testified that no police officer had supplied the appellant with any details of the murder before he took the statement quoted above. The appellant contends that it was error to allow Fannin's testimony that no one had told the appellant the details of the murder at the time he made the statement. He argues that Fannin's testimony was a conclusion or an opinion that had been "rebutted" by other evidence and that it allowed the jury to infer the appellant's guilt from the statement alone.

The appellant's claim that Fannin's testimony was a conclusion or an opinion is without merit. "[A]

witness cannot testify to facts that are not within the witness's knowledge." *Sheridan v. State*, 591 So.2d 129, 133 (Ala.Cr.App.1991). *See also* Charles W. Gamble, *McElroy's Alabama Evidence*, § 105.01 (4th ed.1991). The appellant was arrested in Luverne and was taken to the Luverne Police Department; he 'was locked in a cell, and a warrant for his arrest was read to him and he was given his *Miranda* warnings. After a gunshot residue test was performed on his hands, he was transported to the Troy Police Department. On direct examination by the state, Fannin testified several times that neither he nor any other officer in his presence ever told the appellant any details of the crime. On cross-examination, Fannin testified that officers at the Luverne Police Department probably discussed the details of the crime while the appellant was being held there but he stated that he was sure they did not do so in the appellant's presence. Fannin explained that he instructed Luverne Police Officer. Clifton Wells to stay with the appellant during the entire arrest proceeding and to see that no one discussed the crime around him, and that when he arrived at the department after the arrest, Wells told him that he had carried out his instructions. Any error in the admission of Fannin's testimony, and we do not conclude that there was any such error, was harmless because Officer Wells testified, without objection, at trial that he was in the appellant's presence from the time the appellant was arrested until he was escorted from the Luverne Police Department by Fannin and then transported to Troy, and that neither he nor any other officer ever told the appellant any details of the crime. *White v. State*, 650 So.2d 538, 541 (Ala.Cr.App.1994).

The appellant's claim that Fannin's testimony was "rebutted" is without merit as well. "[T]he fact that a

witness has given inconsistent statements or accounts about an event or occurrence is not a ground for the exclusion of the witness's testimony." *Bird v. State*, 594 So.2d 644, 662 (Ala.Cr.App. 1990), *rev'd on other grounds*; 594 So.2d 676 (Ala.1991). *See also Poole v. State*, 650 So.2d 541, 543 (Ala.Cr.App.1994).

Finally, we note that had the appellant argued on appeal that his statement should have been suppressed, we would find the claim to be without merit. The testimony, during the suppression hearing and at trial, of Troy Police Officers Fannin and Donald Brown and the testimony at trial of Luverne Police Officer Wells established that the appellant had not yet been questioned when he made the statement. His statement was spontaneous and voluntary and therefore admissible. *See Turner v. State*, 674 So.2d 1371 (Ala.Cr.App.1995).

V

As required by Rule 45A, Ala.R.App.P., we have searched the entire record for any plain error and have found none.

As required by § 13A-5-53, Ala. Code 1975, we have also reviewed the propriety of the appellant's death sentence. No error adversely affecting the rights of the appellant was made in the sentencing proceedings. The trial court found the following three aggravating circumstances: that the murder was committed while the appellant was under a sentence of imprisonment; that the appellant had previously been convicted of a felony involving the use or threat of violence to the person; and that the murder was committed during the course of a burglary. The trial court found no statutory or nonstatutory mitigating circumstances. These findings are supported by the

evidence. We are convinced that the sentence of death is proper; it was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Our independent weighing of the aggravating and mitigating circumstances leads to this conclusion, and the sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the appellant. In regard to this last inquiry,

> "[w]e note that similar crimes are being punished capitally throughout this state. *See Stewart v. State*, 601 So.2d 491 (Ala.Cr.App.1992), *affirmed as to conviction, reversed as to sentence, with new sentencing proceeding ordered*, 659 So.2d 122 (Ala. 1993) (murder/burglary and murder/kidnapping). *See also Thomas v. State*, 539 So.2d 375 (Ala.Cr.App.), *affirmed*, 539 So.2d 399 (Ala. 1987), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989) (murder/burglary); *Lynn v. State*, 543 So.2d 704 (Ala.Cr.App.1987), *affirmed*, 543 So.2d 709 (Ala. 1988), *cert. denied*, 493 U.S. 945, 110 S.Ct. 351, 107 L.Ed.2d 338 (1989) (murder/burglary); *Ford v. State*, 515 So.2d 34 (Ala.Cr.App.1986), *affirmed*, 515 So.2d 48 (Ala.1987), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988) (murder/burglary)."

Land v. State, 678 So.2d 201, 224 (Ala.Cr.App.1995).

For the foregoing reasons, the judgment of the trial court convicting the appellant and sentencing him to death is due to be, and is hereby, affirmed.

AFFIRMED.

All the Judges concur.

SUPREME COURT OF ALABAMA

1960659

Ex parte HOLLY WOOD.

(Re HOLLY WOOD

v.

STATE).

March 13, 1998
Rehearing Denied May 22, 1998

ALMON, Justice.*

A jury convicted Holly Wood of murder made capital because it was committed during the course of burglary in the first degree. *See* Ala.Code 1975, § 13A-5-40(a)(4). The jury, by a 10-2 vote, recommended the death sentence. The circuit court accepted the recommendation and imposed the death penalty. The Court of Criminal Appeals affirmed Wood's conviction and sentence. *Wood v. State*, 715 So2d 812 (Ala. Crim. App. 1996).

In his petition for the writ of certiorari, Wood has raised 26 issues for this Court's review; many of these were not presented to the Court of Criminal Appeals. This Court has reviewed each of the arguments presented by Wood and has searched the

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* Although Justice Almon was not present at oral argument, he has listened to the tape of oral argument.

record for plain error not raised; it has found no error that would support a reversal of the judgment. We have found only one issue that warrants discussion: whether the circuit court plainly erred during the sentencing phase of Wood's trial by charging the jury that it "may" consider mitigating circumstances.

Before the jury began deliberations in the sentencing phase of Wood's trial, the circuit court gave general instructions regarding the jury's duty to consider aggravating circum stances and mitigating circumstances in rendering its advisory verdict either for capital punishment or for life imprisonment without parole. The court's jury instructions included this statement:

> "The law of this state provides a list of some of the mitigating circumstance: which you may consider. But that list not a complete list of the mitigating circumstances you *may* consider. I will now read to you a list of some of the mitigating circumstances that you may consider."

(Emphasis added.)

Wood argues that this portion of the court's sentencing-phase jury charge was erroneous and misleading because, he says, it is contrary to Ala.Code 1975, § 13A-5-51 That section, which sets out a list of mitigating circumstances to be considered in the sentencing phase of a capital case, states that "[m]itigating circumstances shall include, but not be limited to, the following. . . ." (Emphasis added.) Focusing on the mandatory language of § 13A-5-51, Wood contends that the circuit court erred by not instructing the jury that it must consider the mitigating circumstances contained in the statute.

Wood contends that the circuit court made the jury's consideration of mitigating circumstances permissive rather than mandatory and he argues that he was therefore deprived of the reliable and individualized sentencing procedure required in capital cases. Specifically, Wood points to *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), in which the United States Supreme Court held:

> "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment, *see Trop v. Dulles*, 356 U.S. [86], at 100, 78 S.Ct. 590, 2 L.Ed.2d 630 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

428 U.S. at 304, 96 S.Ct. at 2991, 49 L.Ed.2d at 961. The Woodson Court further stated:

> "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

428 U.S. at 305, 96 S.Ct. at 2991, 49 L.Ed.2d at 961.

Initially, we note that Wood's reliance on the United States Supreme Court's holding in Woodson has been largely undermined by that Court's recent decision in *Buchanan v. Angelone*, __U.S.__, 118 S.Ct. 757, 139 L.Ed2d 702 (1998). Writing for a six-member majority in *Buchanan*, Chief Justice Rehnquist held

that the Eighth and Fourteenth Amendments of the United States Constitution do not mandate that a trial court give any instruction to a capital jury concerning mitigating circumstances. According to *Buchanan*, all that is constitutionally required in a capital sentencing-phase instruction is that a jury not be precluded from considering mitigating circumstances. Thus, while a trial court cannot instruct a capital jury in such a way that it is prevented from considering mitigating circumstances, *Buchanan* does not require a trial court to give any instructions whatever regarding either the concept of mitigation generally or particular statutory mitigating circumstances.

In *Buchanan*, the United States Supreme Court found no reversible error in a Virginia trial court's sentencing-phase jury instructions, even though mitigating circumstances were not mentioned at all during the charge. In light of this holding, it would seem that the sentencing-phase instruction in Wood's case-which, Wood argues, made the jury's consideration of mitigating circumstances permissive would not be held deficient on federal constitutional grounds. In fact, the *Buchanan* decision indicates that Wood never had a federal constitutional right to an instruction on mitigating circumstances at all, so long as the jury in his case was not precluded in some way from being able to consider mitigating circumstances.

However, nothing in *Buchanan* changes the fact that Alabama law does entitle capital defendants to a sentencing-phase instruction on mitigating circumstances. It is well settled that "every accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case,

and which are supported by any evidence, however weak, insufficient, or doubtful in credibility." *Chavers v. State*, 361 So.2d 1106, 1107 (Ala.1978), citing *Burns v. State*, 229 Ala. 68, 155 So. 561 (1934). Although this maxim has been used most frequently to grant defendants jury charges on lesser-included offenses and affirmative defenses, it is equally applicable to entitle capital defendants to a jury instruction on mitigating circumstances, so long as some evidence has been presented to support a finding of mitigating circumstances. Therefore, because Wood presented some evidence of mitigating circumstances, he was entitled to an appropriate jury instruction on mitigating circumstances.

In addition to being entitled to a jury instruction on mitigating circumstances, Wood was also entitled to have the jury given a charge that was not misleading. *See Page v. State*, 487 So.2d 999, 1008 (Ala.Crim.App. 1986). In that regard, Wood correctly asserts that the portion of the jury instructions excerpted above is an incorrect statement of law. While that instruction stated that Wood's jury "may" consider mitigating circumstances, Ala.Code 1975, § 13A 5 51, *requires* that the jury consider mitigating circumstances.

Nonetheless, despite the fact that one segment of the circuit court's jury instructions contained some ambiguity, the law does not necessarily require a reversal of Wood's sentence. In reviewing jury instructions to determine if they correctly set forth the applicable law, a reviewing court must consider the entire charge. *Volkswagen of America, Inc. v. Marinelli*, 628 So.2d 378, 384-85 (Ala. 1993).

We note that, in addition to being given that portion of the charge highlighted by Wood, the jury was also given this instruction:

> "It is the duty of the jury to weigh the mitigating and aggravating circumstances in its decision. The jury is not free to arbitrarily ignore any factor, positive or negative, in arriving at the correct sentence."

The circuit court also gave the jury this instruction:

> "[I]f there is a factual dispute over the existence of a mitigating circumstance then you should find to [sic] consider that mitigating circumstance, unless you find the evidence is such that it is more likely than not that the mitigating circumstance did not exist"

In light of these additional sentencing-phase instructions, we hold that the jury was sufficiently charged that it must consider mitigating circumstances in rendering its advisory verdict A reasonable reading of the circuit court's entire charge makes it clear that the judge told the jury that it had a duty to weigh the aggravating circumstances and the mitigating circumstances.

Moreover, the fact that the circuit court, in a certain part of its jury charge, used the phrase "may consider" could have properly referred to a capital defendant's burden of proving mitigating circumstances. *See* Ala. Code 1975, § 13A-5-45(g). In many cases, the defendant fails to establish, by the measure of proof required, the existence of mitigating circumstances. In other words, the jury may consider the circumstance if it is properly proved. In fact, it was likely that Wood did not properly prove the existence of mitigating circumstances; we have reviewed the record of the sentencing phase of Wood's trial,

and we have found only scant evidence of mitigating circumstances.[1]

Because the jury was sufficiently instructed that it had a duty to consider mitigating circumstances, and because Wood presented little evidence of mitigating circumstances, we find no indication that the jury or the trial judge disregarded any potential mitigating circumstances that were adequately supported by proof.

We also note that, in response to Wood's argument for a reversal of his sentence, the State has asserted that the circuit court could not have erred in charging the jury that it "may" consider mitigating circums-

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[1] During the sentencing phase, Wood first presented evidence that his family experienced difficult times during his early years. However, no evidence suggested that Wood had suffered abuse as a child.

Second, Wood introduced a copy of the police report that was completed when Wood was arrested in this case. That report described Wood's condition at the time of his arrest as "drinking." However, Wood presented no evidence that he was actually intoxicated, and witnesses for the State testified during the guilt phase that Wood did not appear to be intoxicated when he was arrested.

Third, Wood introduced a report from the State Board of Pardons and Paroles remarking that Wood needed "anger induced, acting out and reality therapy." However, Wood presented no additional evidence to show that he suffered from a mental defect or that he was otherwise mentally incompetent.

Ala.Code 1975, § 13A-5-45(g), requires that a capital defendant prove the existence of a mitigating circumstance by a preponderance of the evidence. Based on the meager amount of evidence presented on the question of mitigating circumstances, we conclude that neither the jury nor the trial judge acted unreasonably by finding that no mitigating circumstances existed in Wood's case.

tances because that instruction mirrored the pattern charge for mitigating circumstances that is set forth in *Alabama Pattern Jury Instructions (Criminal)* for use in the sentencing stage of capital cases tried under Ala.Code 1975, § 13A-5-40(a). To support its contention, the State has relied on *Ex parte Trawick*, 698 So.2d 162 (Ala.), *cert. denied*, _U.S. __, 118 S.Ct. 568, __ L.Ed.2d __ (1997), in which this Court stated that "this Court has held that no reversible error will be found when the trial court follows the pattern jury instructions adopted by this Court." *Trawick*, 698 So.2d at 173, citing *Kuenzel v. State*, 577 So.2d 474, (Ala.Crim.App.1990), *affirmed*, 577 So.2d 531 (Ala.), *cert. denied*, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

This language quoted from *Trawick* implies that a circuit court's jury charge will be unassailable on appeal so long as that charge follows a pattern instruction. However, that would be an improper interpretation of *Trawick*, because pattern jury instructions may be inapplicable under particular circumstances and may, in fact, be challenged by cogent arguments based upon applicable law. This position is supported by this Court's order of December 6, 1982, recommending the pattern jury instructions for capital cases. That order was quoted in *Kuenzel*:

> "[The use of the pattern jury instructions, . . . for the trial and sentencing aspect of cases tried under § 13A-5-40(a), Code of Alabama, 1975, is recommended, *but without prejudice to the right of any defendant to make and preserve for review*

> *in a timely manner any objection thereto either as to form, substance or application.'"*

Kuenzel, 577 So.2d at 520 (emphasis added)[2]

One reading of *Trawick* could suggest that this Court's intent in that opinion was to state that no plain error will be found when the circuit court follows a pattern jury instruction. This position would be supported by the scope of review in *Trawick*, which was limited to plain-error analysis. This view of *Trawick* would also be buttressed by language in the opinion of the Court of Criminal Appeals in *Kuenzel*, which *Trawick* cited, quoting this Court:

> "'We do not think we should hold that the trial judge *plainly erred* when he instructed the jury pursuant to a pattern jury instruction 'recommended' by this Court, especially in the absence of an objection or request from the defendant." *Kuenzel*, 577 So.2d at 520, quoting *Ex parte Harrell*, 470 So.2d 1309, 1315 (Ala.), *cert. denied* 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985). (Emphasis in *Kuenzel* and *Harrell*.)

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[2] *See also*, the "Order of the Supreme Court of Alabama Approving Use of Alabama Pattern Jury Instructions," *Alabama Pattern Jury Instructions* (Civil) (2d ed.1993) at pp. xix-xxii, suggesting that the Court's Advisory Committee on Civil Practice and Procedure "consider the desirability" of amending the Rules of Civil Procedure to add a rule providing in part as follows:

> "The publication by the Alabama Pattern Jury Instructions Committee of Alabama Pattern Jury Instructions in Civil Cases and their use by the trial judges of this state are recommended, *but without prejudice to the rights of any litigant to make and reserve for review any objection thereto either as to form, substance or application.*"

(Emphasis added.)

However, if we examine only the language of *Trawick* and *Kuenzel*, it might yet appear that a trial court could never plainly err by giving a pattern instruction in a capital case. That conclusion would be incorrect because the *Harrell* decision, which was relied on in *Kuenzel*, correctly indicated that this state's appellate courts must examine jury instructions, even if they are pattern charges, on a case-by-case basis to determine whether they are plainly erroneous. Despite the fact that in *Harrell* this Court stated that "we do not think . . . the trial judge plainly erred when he instructed the jury pursuant to a pattern jury instruction," 470 So.2d at 1315 (emphasis omitted), this Court had prefaced that statement by stating earlier in *Harrell* that "the critical question [is] whether we should apply the 'plain error' rule *in this case*." 470 So.2d at 1314 (emphasis in original). Consequently, even though this Court declined to find plain error in *Harrell*, because the trial court had used a pattern instruction, that case *did not hold* that the use of a pattern instruction could *never* constitute plain error. To the contrary, this Court's holding in *Harrell* was limited to the facts of that case.

In light of Harrell, we conclude that the statement in *Trawick* that "no reversible error will be found when the trial court follows . . . pattern jury instructions," *Trawick*, 698 So.2d at 173, was overly broad. While most pattern jury instructions may be properly used in the majority of criminal and civil cases, there may be some instances when using those pattern charges would be misleading or erroneous. In those situations, trial courts should deviate from the pattern instructions and give a jury charge that correctly reflects the law to be applied to the circumstances of the case. Similarly, while there will likely

be few instances in which the giving of a pattern instruction would be plainly erroneous in a capital case, we do not foreclose that possibility. For that reason, a trial court must diligently scrutinize the jury charges it gives even pattern charges on a case-by-case basis to ensure that they properly instruct the jury in accordance with applicable statutes and caselaw.

In Wood's case, however, we have already held that the circuit court's sentencing-phase jury charge, taken in its entirety, was not erroneous. Therefore, *Trawick* has no application to our decision in this case.

In addition to the issue Wood raises regarding the jury instruction, this Court has reviewed the other issues presented to it; has examined the issues addressed and decided by the Court of Criminal Appeals; has considered the oral arguments made before this Court; and has thoroughly examined the record for plain error. We find no error, plain or otherwise, either in the guilt phase or in the sentencing phase of Wood's trial that so prejudicially affected his rights as to require a reversal of Wood's conviction or sentence. As required by Ala. Code 1975, § 13A-5-53, we have reviewed the record, including the circuit judge's sentencing order and the opinion of the Court of Criminal Appeals upholding the imposition of the death penalty in this case. This review shows that Wood's sentence was not the result of "passion, prejudice, or any other arbitrary factor." § 13A-5-53(b)(1). We conclude that the circuit court and the Court of Criminal Appeals properly weighed the mitigating circumstances and the aggravating circumstances. Finally, we hold that those courts did not err in determining that Wood's sentence of death

was properly imposed and was proportional to the penalty imposed in similar cases. Accordingly, the judgment of the Court of Criminal Appeals affirming Wood's conviction and sentence is hereby affirmed.

AFFIRMED.

HOOPER, C.J., MADDOX, SHORES, HOUSTON, KENNEDY, COOK, and SEE JJ., concur.

BUTTS, J.,** concurs specially. BUTTS, Justice (concurring specially).

I agree that the trial court's sentencing-phase jury charge, taken in its entirety, was not erroneous. However, I do not share the majority's concern that *Ex parte Trawick*, 698 So.2d 162 (Ala. 1997), could be construed to preclude a review for plain error in the trial court's instruction to the jury if the instruction is based upon *Alabama Patten Jury Instructions*. In *Trawick*, I pointed out that, in applying a plain-error standard of review, this Court has held that no reversible error would be found where the trial court follows the pattern jury instructions adopted by this Court. *Trawick*, 698 So.2d at 173. This did not, however, preclude us from examining the record in *Trawick* to determine whether the trial court's giving of the pattern jury instruction regarding the jury's weighing of aggravating circumstances and mitigating circumstances could have misguided the jury as to its function and responsibility in weighing these factors. Only after examining the record did we conclude that the trial court's instruction was a clear statement of the applicable law and that there was no plain error in the instruction as given.

** Justice Butts was not present at oral argument but on February 25, 1998, he listened to the tape of the oral argument

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[12] respond to the subpoena, and he had a deposition involving an out of state witness. I certainly don't mind structuring this hearing around his conflict to accommodate him. So his secretary is to let us know as soon as he can be available, but I would think we're going to run into lunch anyway. I know Mr. Dozier is here. I don't know how many others. Is Mr. Salter here?

MR. HOWLEY: I saw him out in the lobby.

THE COURT: So you do have some witnesses?

MR. HOWLEY: We have a number of witnesses, Your Honor, and we'll accommodate Mr. Ralph and work him in.

THE COURT: Would the witnesses—and you may have to help me identify who they are.

MR. HOWLEY: Actually, I think our witnesses are probably out in the back in the lobby at this point. Should they stay there?

THE COURT: The lobby area is fine.

MR. HOWLEY: Petitioner calls Mr. Cary Dozier.

CARY DOZIER

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HOWLEY:

[13] THE COURT: And let me just say this to counsel: You do not have local counsel here to guide you. We probably are more lax than we should be in some regards. But if at any time you need to approach the witness and show them a document or whatever, you

don't have to get leave from me to do that. You just go ahead.

Q. What is your full name?

A. Cary Lynwood Dozier.

Q What is your occupation?

A. Attorney at law, restaurant owner, and real estate.

Q. Where do you practice law?

A. Troy, Pike County, Alabama.

Q. How long have you practiced law in Troy?

A. I came to Troy in '76.

Q. Did you begin practicing law in 1976?

A. No. I practiced law in Montgomery before I came to Troy.

Q. And how long did, you practice in Montgomery?

A. When I graduated from Cumberland, I went to work for the AG's office. That was in '72. I left there and went with Judge Harris, Court of Criminal Appeals, '73, I think. '74, I went to work with Whitesell & Gallion. And when Jimmy Evans became DA [14] in Montgomery, I went over with Jimmy Evans and became Chief Deputy DA.

Q. Have you ever represented the petitioner Holly Wood?

A. I sure have.

Q. When did you represent him?

A. I don't recall the date.

Q. What action or proceedings did you represent him on?

A. It was on a capital murder case.

Q. How did you come to represent Mr. Wood?

A. Appointed by the Court.

Q. Were you the only lawyer appointed?

A. No, I was not. We had myself, Frank Ralph, and Trotter.

Q. Do you remember Mr. Trotter's first name?

A. I can't think of his first name. I practiced law with him for a short period of time.

Q. What do you mean by you practiced law with him?

A. He was in my office, shared office space with me for a short period of time.

Q. For how long a period of time?

A. I don't even know whether Trotter was there a year or not. I don't think so. I could be wrong on [15] that.

Q. Were you in partnership with Mr. Trotter?

A. No, I was not.

Q. Was there any division of responsibilities among the three lawyers for Mr. Wood's case?

A. I think Trotter handled the aggravating circumstances and mitigating circumstances as far as the sentencing process went. Basically me and Mr. Ralph were basically the trial lawyers.

Q. Who determined that division of responsibility?

A. No one. It was basically agreed to.

Q. I'm sorry? I didn't catch the—

A. I mean, we just all agreed it would be handled that way. As far as lead counsel, I don't think Frank was lead counsel no more than I was. We just basically designated Trotter to do the sentencing aspect of it. Of course, we participated, but he took it on and he filed the motions.

Q. Did Mr. Trotter handle the sentencing portion of the trial?

A. Some of it. Not all of it.

Q. Who, if anyone, of the three lawyers was responsible for investigating mitigating circumstances?

[16] A. All three of us.

Q. And what did you do to investigate mitigating circumstances?

A. We went over the motions with Mr. Trotter; of course, psychological evaluations and things that we felt were necessary at the sentencing stage.

Q. Did you speak to any potential witnesses on mitigation?

A. I don't recall. I know we had a lot of correspondence with psychologist and so forth. It's been so long. I can't remember.

Q. What did you know about Mr. Trotter's experience at the time?

A. About his experience? Well, Trotter graduated from Vanderbilt. He worked with Frank Tipler in Andalusia, which is a great lawyer, Mr. Tipler. And when he came to Troy credential-wise, I was glad to have him in my office.

Q. How long did he work for Mr. Tipler?

A. I have no idea. Probably—maybe six months, eight months. I don't know.

Q. At the time of Mr. Wood's trial, had you had any discussions with Mr. Tipler about Mr. Trotter?

A. I talked to Mr. Tipler's son. You've got to understand, he wanted to share office space. We were [17] not partners. And I knew Mr. Tipler, the old man. I didn't know his son. I just talked to him one day about it. I was in Andalusia one day and mentioned his name. And other than that, that's all I know about Trotter. I mean, he ran his law office and I ran mine.

Q. Did you know at the time whether or not he had any trial experience?

A. No. I never asked.

MS. ANDERSON: Judge, at this point, I'd like to object. I don't know what claim this relates to in the amended petition about the fact—it seems that they're trying to suggest that Mr. Trotter didn't have any experience when Mr. Trotter would probably be

the best person to testify to experience. And there's no claim specifically attacking the experience of Mr. Trotter; therefore, this has nothing—it's not relevant to an allegation that's actually been specified in the petition.

A. For the record, I didn't appoint Mr. Trotter in this case. The Court did.

THE COURT: Objection is overruled.

Q. (Mr. Howley) Did you know at the time whether or not Mr. Trotter had done anything in the area of criminal work?

[18] A. Not at the time, no.

MR. HOWLEY: Your Honor, may I ask the reporter to mark an exhibit for identification only?

(Petitioner's. Exhibit Number 1
was marked for identification.)

Q. Mr. Dozier, please take a look at Exhibit 1. Is that your signature that appears about the middle of the first page?

A. Uh-huh, it is.

Q. Do you recognize this document?

A. I do.

Q. Can you tell me what it is?

A. It's an attorney's fee declaration to the State.

Q. Is this an attorney's fee declaration that you filed in Mr. Wood's case?

A. It is.

Q. Looking at the second and third pages, does this accurately record time that you spent working on Mr. Wood's case?

A. It does.

Q. Does this reflect all of the time that you spent working on Mr. Wood's case?

A. Unless you're talking about the time I spent with Mr. Ralph and Mr. Trotter discussing the case, [19] no. I mean, when I talk to co-counsel, I don't add hours to my hours. You understand what I'm saying?

Q. Yes, sir.

A. So I mean, there's some hours there probably where I discussed the case with Frank or might have discussed it with Trotter. I don't add those hours. I don't split my hours like that.

Q. Other than your discussions with your co-counsel, can you think of any time that you spent on Mr. Wood's case that is not recorded in this document?

A. There could have been some time I spent with the investigator. That's probably not on there.

Q. If you would, look at the third page, please. There's an entry there, total out of court hours. Do you see that?

A. Uh-huh.

Q. And just above that it says, other hours exceed the limit. Do you have any recollection of the extent to which other hours exceeded the limit?

A. No, sir, I don't.

Q. Did you meet with Mr. Wood prior to the trial of this action?

A. Sure did.

Q. How many times?

[20] A. I have no idea. More than once. More than twice.

Q. Do you recall when those meetings occurred?

A. No, I don't.

Q. Please take a look at Page 2 of Exhibit 1, the second entry where it says conferring with the defendant. There appears to be a date February 4, 1994. Does that refresh your recollection as to when you may have met with Mr. Wood?

A. I assume on February 4, 1994.

Q. Do you see another entry a couple of lines down, February 23, 1994?

A. Correct.

Q. Does that refresh your recollection at all about when you met with Mr. Wood?

A. No.

Q. Sitting here today, do you have any recollection of any meetings other than the two meetings that are indicated here?

A. I'm sure I talked with Holly Wood more than that. But I mean, I don't recall right off the top of my head.

MR. HOWLEY: Your Honor, I don't have any more questions for Mr. Dozier.

CROSS-EXAMINATION

[21] BY MS. ANDERSON:

Q. Good morning, Mr. Dozier. My name is Katie Anderson. I'm with the attorney general's office. Going back to your background, obviously you had experience prosecuting criminal cases. Did you handle any capital cases when you worked for the State of Alabama?

A. Not with—no. You had to have five years, I think, back then.

Q. Okay. At the time that you represented Mr. Wood, what percentage of your practice was criminal cases?

A. It was probably 50 percent or better.

Q. And had you represented a capital murder defendant before Mr. Wood?

A. Two or three.

Q. Do you remember who they were?

A. Not right offhand. I think one was a Tucker. I don't recall.

Q. But you say about two to three before you represented Mr. Wood?

A. Uh-huh.

Q. What about felony jury trials, if you had to estimate before you represented Mr. Wood, how many you'd handled? And I know that's a tough question.

A. [22] Appointed cases, probably over a thousand or more.

Q. And that's just appointed cases?

A. I mean, counting appointed cases and other cases, yeah.

Q. How many do you think you've prosecuted felony cases?

A. As a DA?

Q. Yes, sir.

A. In Montgomery probably—I don't know.

Q. Of course, it's just an estimate.

A. Probably over a hundred probably, you know, counting the misdemeanors and everything else.

Q. Are you familiar with an organization called Capital Resources or Equal Justice Initiative?

A. I am.

Q. Did you receive any assistance from them in representing Mr. Wood?

A. They represented Mr. Wood on appeal, one stage of it.

Q. So they became involved during the appellate, portion of the trial?

A. Right.

Q. So you didn't receive any assistance from them during the trial itself?

A. [23] No.

Q. Or in your pretrial preparation?

A. Not that I know of, no.

Q. So you're not aware of a notebook or anything that they use?

A. Yeah, I know about the notebook. Yeah, I had that.

Q. Can you explain that notebook?

A. It just basically sets out certain things on a capital murder case that you need to follow as far as guidelines.

Q. Did you have that when you represented—

A. Sure did.

Q. Did you all use that?

A. I think Frank had one and Trotter had one.

Q. Oh, Mr. Ralph and Mr. Trotter?

A. I'm pretty sure they did. I think all three of us did.

Q. Did you find that notebook helpful?

A. Some parts of yes. Some of it just basic stuff.

Q. Did the notebook give any suggestions about the penalty phase, about mitigation, and investigation of mitigating evidence?

A. It did. Motions and so forth.

Q. [24] Now, just to be clear, on Petitioner's Exhibit 1, your time sheet that's in front of you, the meetings here indicated with Mr. Wood, you are saying that not necessarily every meeting you had with him is contained on this report?

A. It's not.

Q. And if you turn to the third page, where opposing counsel pointed out where it says specifically other hours exceed the limit, what did you mean by that?

A. In other words, that's all we could bill. I mean, you couldn't bill but for so much, and that was it. Why list the other hours on there? You know, to me,

it's not necessary. I exceeded the amount, and that was it. That's all I put down.

Q. So is it a fair statement that that document is not representative of all the time that you put into this case?

A. No, it's not.

Q. And due to the passage of time, it's hard for you to recall exactly how much time you put into this case?

A. If I had my files, I could tell you, but I don't have my files any more. And somebody made the statement earlier that you or they had requested my [25] files. Nobody has requested any files from me, period.

Q. So no one has attempted to obtain your files?

A. No. When Joel Williams called me, I told Mary Ann on the phone I didn't have any files because my law office caught on fire, and the majority of the files I had were destroyed in the fire.

Q. So you did have files on Mr. Wood's case; they were destroyed in a fire?

A. Sure.

Q. But there were files maintained at your office prior to that?

A. Correct.

Q. Did you stop working on this case—well, I think you've already answered this. But you didn't just stop working on this case once you met that fifty hour out of court—

A. No.

Q. Did you treat Mr. Wood different than your paying clients?

A. I don't treat anybody different.

Q. Would you consider that you were dedicated to this case?

A. I was dedicated to Mr. Holly Wood.

Q. [26] I mean, you knew what was at stake in this case?

A. Sure.

Q. About your relationship with Mr. Wood, generally did you think you had a good working relationship with him?

A. I had very good working relationship with him.

Q. So could you describe that or elaborate on that?

A. Holly Wood was always nice, cooperated, you know, in trying to give us information that we could follow up on and so forth. I had no problems with Holly Wood whatsoever.

Q. Do you have any knowledge of whether your co-counsel met with Mr. Wood or not?

A. I couldn't tell you.

Q. What about the investigator? Do you have any knowledge of that?

A. I'm sure Mr.—I think his name was Taylor. Is that correct?

Q. Uh-huh.

A. I'm sure he met with Holly Wood and members of the family and other people.

Q. Was Mr. Wood forthcoming with information [27] with y'all? Did he provide you with information about the case?

A. He did.

Q. And did you follow up on any leads or information that he provided to you?

A. We did.

Q. Did Mr. Wood ever complain to you that you were not spending enough time with him or were not following up on information that he was providing?

A. Holly Wood never complained to me.

MS. ANDERSON: Judge, I'm not introducing this into evidence. This is already in the record, on the clerk's record on Pages 118 through 121.

Q. I'm going to show you some documents. I believe it's pertaining to a Mr. Jones who was initially appointed in this case. Are you familiar with that?

A. I'd have to read it.

Q. Basically it's a motion to dismiss counsel,not referring to you. And, it's a letter from Mr. Wood complaining about his counsel. Do, you have any knowledge of any type of motion or letter of complaint being filed against you or Mr. Ralph or Mr. Trotter by Mr. Wood?

A. Not that I know of.

Q. [28] Who was responsible for preparing and researching the pretrial motions in this case? Do you recall?

A. All three of us, I guess. No particular individual. We probably got together and filed our motions.

Q. So all three of you participated in that?

A. Sure.

Q. And you also had the Capital Resources notebook as well?

A. Correct.

Q. Did you personally work on the motion to suppress Mr. Wood's statements to authorities in this case?

A. All three of us probably worked on it. I might have typed it up or Frank might have typed it up or Trotter had his secretary type it up. I don't recall. I mean, we were doing it as a team up until the trial date and so forth.

Q. Do you recall what your strategy, so to speak, was at the suppression hearing? Obviously you wanted to keep his statements out. But do you recall

what specifically you were trying to use in order to keep those—

A. Not right offhand, I don't know.

Q. [29] I understand. It's been a long time. Did you discuss with Mr. Wood the suppression hearing and your effort to try to keep his statement out?

A. I'm sure I discussed it with him. All the motions were discussed with Holly Wood.

Q. All of the motions were?

A. Yeah.

Q. Do you specifically remember discussing with Mr. Wood his testimony? He testified at the suppression hearing. Do you recall talking to him before that discussing what his testimony was going to—what purpose it was going to serve for?

A. I don't recall.

Q. You don't recall?

A. I don't recall. I know—I think Holly Wood took the stand for a limited purpose only—and I don't remember what it was—at the suppression hearing rather than going into detail.

Q. Did you thoroughly investigate the circumstances surrounding Mr. Wood's arrest?

A. I did.

Q. And didn't you, in fact, specifically during the suppression hearing bring out information about the conduct of the police officers that night?

A. Right. That was in Luverne now, Crenshaw County.

Q. [30] And didn't you specifically question witnesses about when that arrest warrant was actually issued?

A. I did.

Q. And try to make an issue out of that during the suppression hearing?

A. Yeah, I recall that.

Q. Did Mr. Wood ever relate to you that he was intoxicated when he was arrested?

A. I can't remember whether Holly Wood did or Salter. I don't remember. There was something. There was some discussion about intoxication.

Q. At the time of arrest?

A. Before the arrest. I think they had been out drinking all day or something like that. I might be wrong on that, but I think they were riding around drinking all day that day.

Q. Do you recall investigating the possibility that he may have been intoxicated at the time, that he was arrested and made statements to authorities?

A. I could have. I don't recall. I remember intoxication coming in somewhere.

Q. Now, you all filed a motion to have Mr. Wood evaluated by a psychologist, did you not?

A. [31] We did.

Q. What was your reasoning for that? Wasn't it for both competency and mental state at the time of the offense?

A. It was.

Q. Were you also trying to maybe discover or get a lead on some possible mitigation evidence?

A. We were.

Q. Did that report provide anything for you all?

A. I think it indicated that Holly Wood had some problems at a younger age or something like that. I just don't recall all this. But I think there was some childhood problems, something in the report.

Q. So anything in the report, would you have pursued that at the penalty phase?

A. Oh, we did. We did.

Q. Now, there's an allegation in there about not filing a motion for individual voir dire. Do you have any recollection of that?

A. No, I don't.

Q. Wasn't a jury questionnaire used in this case by defense by your request through defense?

A. I think we typed up one, if I'm not [32] mistaken. I could be wrong now, but I thought we had an individual voir dire questionnaire form. Now, whether or not the Court used it or not, I don't know.

Q. There were questionnaires submitted to the jury in this case. Do you recall if you found those helpful or not?

A. Not right now, I don't. I mean, they could have been.

Q. Weren't you, in fact, able to conduct a pretty extensive voir dire in this case?

A. I thought it was extensive. I did.

Q. You did find it was extensive?

A. Uh-huh, I did.

Q. When you were in voir dire, did you have an interest in questioning jurors about their position about the death penalty knowing that this case could feasibly go to a penalty phase if Mr. Wood was found guilty of capital murder?

A. Are you asking me did we ask those questions?

Q. Did you have a concern or an interest in getting that information?

A. Sure did.

Q. So you would ask questions of the jury to—

A. Did they believe in the death penalty, an [33] eye for an eye, and all this kind of stuff.

Q. And you would think that that was important to know from a juror?

A. Very, very important.

Q. Now, you all had an investigator in this case; is that correct, Mr. Taylor, I believe you said earlier?

A. I think that was his name.

Q. And did you file a motion for funds for him?

A. We did.

Q. How did you find out about Mr. Taylor; do you recall?

A. He was highly recommended by another investigator that we had used in the past. I think Mr. Taylor had been a detective or an investigator in Montgomery. He came highly recommended.

Q. Do you know particularly about Mr. Taylor's background and experience?

A. Right offhand, no. I imagine probably thirty years or longer.

MS. ANDERSON: And this, again, is not being admitted into evidence. It's just being used to refresh the witness' memory. It's already a part of the record in this case on Pages 230 and 231 of the clerk's record.

Q. [34] I show you what appears to be Mr. Taylor's resume or CV.

A. Okay.

Q. Does that refresh your memory a bit about his qualifications?

A. It does.

Q. What kind of qualifications did he have to be an investigator in this case?

A. What I looked for is somebody that has a lot of experience in detective work and so forth, and Mr. Taylor had that. Now, whether or not he had been a private investigator per se, I mean, I could care less as long as he's got the experience in crime.

Q. And he did have several years of experience?

A. Oh, several years, yeah. What was his name? Was it Pete Taylor?

Q. Looks like R. C. Pete Taylor.

A. Okay.

Q. What was your defense strategy, so to speak, in this case? What was your angle on the defense during the guilt phase of the trial?

A. My concern in the whole case as far as Holly Wood was concerned—first of all, they had him with burglary one. I never felt or thought that the State presented any evidence whatsoever to show or establish [35] that Holly Wood burglarized anybody. That was the main concern of the whole case. If they couldn't prove burglary, then that would bring it down to a lesser included offense. There would be no capital murder. And my whole argument throughout the trial was I honestly felt they never proved that. They had no key witness whatsoever to substantiate that Holly Wood actually committed the murder with the exception of one person, and that was his cousin, Salter.

Q. Didn't you, in fact, specifically cross-examine witnesses, being the victim's family members, about—and I believe Mr. Salter about conversations that had happened and whether an invitation to attend was actually revoked or not?

A. Right. There was—I know there was a conversation between. Holly Wood and the alleged victim and some problems that supposedly had happened before the homicide took place. Supposedly they came back at trial and testified that Holly Wood had been warned not to come on the premises. We presented evidence—I do recall this—that Holly Wood had been seeing the victim and talking to her on the phone, which you could assume if you wanted to that they were back on a friendly basis and she could have invited him to the house. And that was the basis of our—assuming he [36] went to the house. I'm not saying he did because I don't know. But the point is nobody ever put him at that house. Even

Salter couldn't put Holly Wood in that house where the homicide took place.

Q. So you pursued the fact that the State—you were trying to show the State couldn't show the burglary element of the capital murder charge?

A. Correct.

Q. What about other defenses? For example, alibi? Did Wood provide you with any information to support any other defense to present in this case?

A. No. I think Holly Wood admitted he was riding around with Salter. I think that was his name. But—

Q. That being Calvin Salter?

A. Yeah. There was some disagreement between him and Salter as to whether or not he took the gun out of the truck and went to the victim's house. The only one that said that would be Salter because nobody saw Holly Wood with the gun whatsoever.

Q. But did Mr. Wood provide you with any information, for example, like an alibi defense or any other kind of defense or give you any information where you could call witnesses to call on behalf of him to support such a defense?

A. [37] I think he had a family member that we thought about using for an alibi witness, but it didn't pan out.

Q. Do you recall who that was?

A. No, I don't. It could have been a sister or something. Anyway, it didn't pan out, so that was it.

Q. Do you recall why they didn't pan out?

A. Just wasn't the same testimony.

Q. I'm sorry? I don't understand.

A. I mean, I don't want to get into that. We could not use her for a witness. We'll just put it that way.

Q. Why not?

A. I just didn't need her as a witness.

Q. So you felt like she wasn't being truthful?

A. I didn't say that now.

Q. Why didn't you feel like you could call her?

A. I just, felt like she couldn't help us with our case.

Q. Do you remember why you felt that way?

A. Because they had Salter for one reason, his cousin, testifying that he was with him. And then they bring another family member in, it would just be—I didn't want to get into a conflict with family members, and that's basically what it was. I mean, [38] she couldn't tell me point blank that Holly Wood was not with Salter that day; so, I mean, I didn't need her.

Q. What could she tell you? Do you recall?

A. That she had seen Holly Wood earlier or something like that, but that still wouldn't help my case one way or the other.

Q. Had she had evidence or testimony that would have supported an alibi defense, would you have called her as a witness?

A. In a minute.

Q. You don't recall that sister's name?

A. Sure don't.

Q. Was it Johnnie Pearl Wood?

A. I don't know. I don't recall.

Q. What about Lillie Jean Wood?

A. I don't recall.

Q. Maeola wood?

A. I don't recall, period.

Q. Well, I was hoping maybe if you heard the name you'd remember.

A. We talked to several witnesses. I don't even remember who we talked to, I'll be honest with you up front.

Q. Was it someone who didn't testify at the [39] penalty phase? Do you recall was it another sister that wasn't called as a witness?

A. I'm telling you right now, I don't recall.

Q. Do you recall anything else that you specifically investigated or looked into regarding a defense in this case?

A. I think we did a lot of forensics, but I don't even think there was any forensics—now, I might be wrong on that—to put Holly Wood at the scene of the crime. I don't even think the gun—I don't recall the shotgun—I remember the shotgun, but I can't recall whether they did any forensics on that shotgun or not. As far as fingerprints and so forth, I don't think there was any scientific evidence. I could be wrong.

Q. Did you all conduct discovery in this case?

A. We did.

Q. What all did you do; do you recall?

A. No, I don't recall. I know we filed a motion.

Q. Did you interview the State's witnesses in this case?

A. We did.

MS. ANDERSON: I'm not introducing this into evidence. It's already in the record on the clerk's [40] record Pages 223 through 29.

Q. Mr. Dozier, this is a billing invoice from Mr. Taylor. If you could just—

A. Pete.

Q. Yeah. Do you recall him interviewing different—didn't he, in fact, interview many different officials from the State and people involved in the investigation in this crime for the State of Alabama?

A. He did.

Q. So he thoroughly did an investigation into the State's case that they intended to present?

A. He did.

Q. I think he interviewed several of the district attorney's team that prosecuted this case as well.

A. He interviewed a bunch of people.

Q. Did you all do your own independent discovery outside of what Mr. Taylor did, too?

A. Yes, we did.

Q. And that also includes whatever Mr. Ralph and Mr. Trotter also did?

A. Yes.

Q. So did you have any success in locating any credible defense witnesses?

A. [41] To tell you the truth, I don't even recall who we called on his behalf, if we called anybody. I mean, I just—it's been so long.

Q. If I may and the record will reflect, there were no defense witnesses called in this case in the guilt phase.

A. Well, I don't know of any that we could have called on his behalf.

Q. If your independent investigation or the investigation of Mr. Taylor or the investigation of whatever Mr. Ralph and Mr. Trotter were doing had turned up a credible defense witness, would you have called them?

A. Sure.

Q. Didn't you all specifically attack the State's investigation of the crime scene in this case? Do you recall that?

A. I'm sure we did, but I don't recall. I remember a lot of things about the arrest. Some of the conversations supposedly made—I can't remember whether it was about Holly Wood or Salter—on the way back to the police station here, I felt should have been suppressed. And there could have been some things

in the house or the apartment or something that we—I just don't recall.

Q. [42] Speaking about Mr. Salter, did you have a specific interest in his testimony? I mean, did you know what his testimony was going to be in this case?

A. I did.

Q. Mr. Salter, in fact, had given statements—

A. Even Holly Wood knew what Salter was going to testify to.

Q. And Mr. Salter had actually made a statement to the authorities on September 2nd. Do you recall that? It was the early morning hours after the offense?

A. I recall something to that effect, making some kind of statement.

Q. Do you recall your investigator also interviewing Mr. Salter?

A. I do. I know Pete interviewed him, and I think Salter basically—I could be wrong—basically stuck with his story.

Q. Do you recall Mr. Taylor, the investigator, interviewing members of Mr. Salter's family; for example, his sister?

A. He interviewed family members I know.

Q. Of Mr. Salter, not Mr. Wood. I'm talking about Mr. Salter right now.

A. I'm sure he did. I just don't recall it. I [43] don't even remember who the family members were.

Q. Again, I'm going to show you Page 225 of the clerk's record at the top there. This is, again, from the billing invoice from the investigator you hired. So it looks like he interviewed Mr. Salter and relatives of Mr. Salter as well?

A. Correct.

Q. Didn't he take a taped statement from Mr. Salter?

A. I don't recall. He could have.

Q. Didn't you, in fact, use that interview that your investigator did to cross-examine Mr. Salter at trial?

A. We could have.

Q. Do you recall also using the statement that Mr. Salter gave to authorities to cross-examine him during his testimony?

A. I'm sure we did.

Q. Do you recall obtaining a criminal history on Mr. Salter?

A. I don't recall.

Q. Again, on Page 225 of the clerk's record in the transcript of this case, doesn't that indicate that Mr. Taylor checked into the records of Mr. Salter, looks like in May of 1994? Do you see that on [44] there?

A. Are you talking about right here?

Q. At the top portion where it says records check?

A. Oh, okay, at the top. I see where you're talking about now. In Crenshaw County. I thought you were talking about on NCIC or something.

Q. Well, I don't know if he had access to NCIC or not. Wouldn't you think it was important about his record?

A. Sure.

Q. Did you have any knowledge of Mr. Salter using any drugs or alcohol the night of the offense?

A. I don't recall.

Q. Didn't you, in fact, question Mr. Salter pretty extensively about the amount of beer that was—

A. We talked to him about the beer—alcohol. We did.

Q. Basically comparing the three different statements he had and trying to determine exactly how much beer he'd had to drink?

A. Correct.

Q. Did anyone ever report to you that Mr. Salter and—that being Mr. Wood or anyone else—[45] was drunk or high the night of the offense?

A. I don't recall. At the time, it supposedly occurred. Whether it occurred, I don't know. I just remember somewhere in my mind there had been drinking—I don't know—all day or after the alleged shooting or whatever. I know there was some alcohol involved somewhere. Maybe they were intoxicated when he was arrested in Luverne, but that might have been—was that the next day or when? I don't recall.

Q. It was the early morning hours following—

A. He might have been well intoxicated at that time, Holly Wood and Salter both. I just don't know.

Q. If you had information that Mr. Salter was drunk or using drugs on the night of the offense, would you have brought that out?

A. Sure.

Q. We discussed intoxication a little bit in terms of suppression regarding Mr. Wood. But in terms of a defense strategy at the guilt phase, had you all considered presenting evidence that he was intoxicated at the time?

A. I think we did. Don't hold me to that, but I think we did bring out some testimony at the sentencing phase that he was intoxicated. I could be [46] wrong, but I'm pretty sure we did.

Q. Did Mr. Wood ever report to you that he was intoxicated at the time of the offense?

A. I don't recall.

Q. Do you recall any other family members or friends or anyone else providing you with information that he was intoxicated at the time of the offense?

A. I don't recall. It might have been somebody. I'm trying to remember now. They might have gone through Luverne and stopped somewhere and had a few drinks or something like that—I just don't recall—with a family member.

Q. Had there been evidence that Mr. Wood was actually intoxicated at the time of the offense, would you have presented it?

A. Sure.

Q. We talked a little bit about a Dr. Kirkland evaluated Mr. Wood at your request.

A. What are you asking me?

Q. Do you recall that that evaluation was done?

A. As far as I know, it was done, yes.

MR. HOWLEY: Your Honor, I'm sorry, I don't want to interrupt your questioning. I just turned around and noticed that our psychologist, our expert witness, has entered the courtroom. I don't [47] understand how the rule works here whether the rule applies to experts.

MS. ANDERSON: We would ask that anyone that's going to testify not be present while another witness is on the stand.

MR. HOWLEY: Is that how the rule works, Your Honor? I don't know.

THE COURT: It's completely discretionary. Since they're asking that your expert not be exempted from the operation of the rule, if you'll just ask he or she, whomever, to have a seat back here.

Q. (Ms. Anderson) I'm sorry, Mr. Dozier. Back to the evaluation that was done, it was actually a Dr. Karl Kirkland did the evaluation that you all had requested. Do you recall in his report statements that

Mr. Wood made to him about the lack of use of alcohol or drugs the night of the offense?

A. I don't remember. I don't remember.

MS. ANDERSON: Again, I'm just using this to refresh the witness' memory. It's already a part of the record. Actually, I believe Mr. Kirkland's report is in there in two different parts, but it can be found on Pages 240 through 246 of the clerk's record.

Q. I'll give you chance to review that. I've got my own copy back here. Specifically, if I could [48] bring your attention to—looks like the third page, that first paragraph—or excuse me, second paragraph. Didn't Mr. Kirkland report that Mr. Wood denied any current abuse of alcohol or denied using any alcohol or drugs on the day of the alleged offense?

A. He did.

Q. And, in fact, said he used marijuana as a teenager but hadn't smoked pot in years?

A. That's what it says.

Q. Okay. And I think again, if you go to Page 6 of the evaluation report, looks like this is where Dr. Kirkland was specifically questioning Mr. Wood about the offense. And he was unwilling to discuss the actual facts of the offense, but was, quote, quite willing to discuss the lack of drugs or alcohol on the day of the offense. Do you recall those findings?

A. I don't recall it right now.

Q. And, again, further down on that same page, talks about a lack of any alcohol or drug problem. Would this report have influenced any attempt on your part to introduce any evidence of an intoxication defense of this case?

A. It would.

Q. Does this report in any way conflict with [49] anything that Mr. Wood reported to you?

A. I don't recall, I mean, as far as Holly Wood, as far as the alcohol abuse that day or something like that. I don't recall whether it came from Holly Wood or Salter or who that came from. So I can't say there was a conflict because I can't honestly say that Holly Wood told me he was drinking on that day, or he might have told me he was drinking. I just don't recall.

Q. There's also some allegations regarding the fact that Mr. Wood was suffering from anguish or emotional stress because of the condition of his relationship with the victim in this case. Do you have any memory of that?

A. No, I don't.

Q. Do you have any recollection of specifically cross-examining witnesses about whether Ms. Gosha was seeing someone by the name Amp?

A. I remember Amp, yeah.

Q. But you don't specifically remember anything about that?

A. I think Holly Wood accused her on the night of the alleged killing. I could be wrong now, but somewhere in my mind Holly Wood and Salter went looking for Amp and her. Now, I might be wrong about [50] that.

Q. Do you know why? Do you remember why?

A. Do I remember why?

Q. Yes, sir.

A. According to Salter, Holly Wood was mad, going looking for Amp. That's all I know. I don't know whether he went to a housing project or where they went. They went somewhere looking for Amp or Hamp or something like that, trying to catch them together. And they might have caught them together earlier that day. I don't recall.

Q. You were aware that the relationship was somewhat at odds at the time of the offense?

A. Sure.

Q. Did you all try to bring that out, or did you feel that was—

A. I tried to bring it out that they were at odds at one point, but we also tried to bring it out that Holly Wood and the victim had gotten back together on good terms.

Q. Well, it seems during the penalty phase, the second phase, you specifically asked some of Mr. Wood's family members about him being upset about Amp and the victim having a relationship. Would you have had a concern about bringing that information out or [51] harping on that information during the guilt phase, for instance, that it would give a motive?

A. You mean, to commit the crime? Or motive for the crime?

Q. Yes, sir.

A. Never thought about it in that respect. Sure didn't.

Q. Do the names TC or Douglas mean anything to you?

A. (Witness shakes head.)

Q. On Page 226 of the clerk's record—and, again, this is in Mr. Taylor's billing invoice to y'all—looks like he was spending time trying to locate a TC or Douglas. And I was just wondering if you have any recollection at all of who those gentlemen are and what their relation to this—

A. No. Holly Wood can correct me if I'm wrong, but I think TC and Douglas were supposed to be with Holly Wood on the day that this occurred, but we could never locate them.

Q. So that was a potential alibi defense?

A. Sure.

Q. And clearly this indicates that you all investigated that?

A. Sure.

Q. [52] And obviously it didn't pan out?

A. Right. I don't think we ever located them. We could have. I just don't remember.

Q. Had you located them and found them to be credible witnesses, would you have called them?

A. Yes, ma'am. I think somewhere in my mind Holly Wood was alleging that TC or Douglas committed the crime. I could be wrong there, but I think I'm right.

Q. I'm sorry?

A. I think Holly Wood was basically saying that TC and Douglas were the ones who basically committed the crime over some drugs or something. I remember that, something about drugs and money.

Q. In fact, you cross-examined—and it may not have been you personally. And I apologize, I don't actually know off the top of my head. But someone from the defense actually cross-examined during the trial and brought those names up and talked about exchanging money. Do you recall that?

A. I don't recall it, but we probably did. I just remember the names TC and Douglas.

Q. But nothing was ever found on that?

A. No.

Q. Despite your investigation into that?

A. [53] Nothing.

Q. Did you have any indication or concerns that Judge Barr was not being impartial in this case?

A. I had no problem with Judge Barr.

Q. Moving on to the penalty phase, what was your—now, there was some conversation from. Mr. and I believe his name is Kenneth Trotter; is that right?

A. Correct, Ken Trotter.

Q. —was in charge of the penalty phase?

A. I didn't say he was in charge of it. I said he did basically' most of the motions and had them—me and Frank and Trotter put them all together, and we basically let Trotter handle the sentencing part of it.

Q. But you were all involved in the investigation process?

A. Sure, all three of us.

Q. Do you recall if took any witnesses during the penalty phase?

A. I don't recall.

Q. So he hardly acted alone in handling the penalty phase of this cases

A. No. All three of us took part in it.

Q. What about Mr. Taylor, the investigator?

A. [54] I don't recall whether Taylor was there or not.

Q. Do you recall if you used him to look into discovering mitigating evidence?

A. We did.

Q. Didn't he, in fact, interview members of Mr. Wood's family?

A. I'm sure he did.

Q. And if he did, would that be reflected in his billing invoice?

A. It should be.

Q. Did you specifically talk to any of Mr. Wood's family members before the penalty phase?

A. I don't recall. I think I talked to Holly Wood's daddy and maybe some other members. But other than that, I just don't recall.

Q. JP Wood?

A. JP, uh-huh.

Q. So you believe that you might have spoken to him before he testified?

A. I'm sure I did, yeah.

Q. But if you hadn't spoken with someone, that doesn't mean that someone else didn't speak with them?

A. That's correct.

Q. Who made the decision about who testified at [55] the penalty phase? I believe it was Mr. Wood's father and two sisters that testified. Do you recall how that decision was made?

A. I do not.

Q. Were all of Mr. Wood's family members forthcoming with information that would have been helpful at the penalty phase?

A. As far as I know. I mean, I don't recall, but I'm sure they were.

Q. Did you try and pick the witnesses that you found most credible?

A. I don't recall.

Q. Well, what was the general strategy, I mean, obviously besides trying to pursue a life without parole sentence? Were you trying to portray Mr. Wood in a certain way, or was there certain things you were trying to—

A. Only thing I remember was something about his childhood, and I don't recall what it was all about. I just don't recall. I mean, that's been a long time ago.

Q. I understand, and I apologize. Did Mr. Wood provide you with information about his background?

A. I'm sure he did. Yeah, he did.

Q. Did you all follow up on and investigate any [56] leads that he actually provided you with as far as the penalty phase?

A. I'm sure we did.

Q. Did you present all the evidence that you were aware of that could help him in that regard at the penalty phase?

A. As far as I know, we did.

Q. Had you been made aware of or provided any other information, would you have presented it on his behalf?

A. If we'd had it, we'd have presented it.

Q. But you do not have any specific recollection about what the investigator was doing in this case?

A. I just don't recall. You're talking about Pete Taylor?

Q. Yes, sir.

A. He was investigating the whole case, just doing a thorough investigation as far as I was concerned.

Q. Did you ever consider using Dr. Kirkland's report, the evaluation that we discussed, at the penalty phase?

A. I don't recall. I'm sure I might have presented it at the sentencing phase. It's part of [57] the court record, so I'm sure it was introduced somewhere.

Q. If you had chosen not to, would that have been something that you specifically chose or determined not to do? I mean, do you think it was something you would have just overlooked?

MR. HOWLEY: Objection, Your Honor. He just testified he doesn't remember.

THE COURT: Sustained.

Q. (Ms. Anderson) Had there been information in the report that you found useful for Mr. Wood to present, would you have presented it?

MR. HOWLEY: Same objection, Your Honor.

THE COURT: Overruled.

Q. I'm sorry, can you answer the question?

A. We would have.

Q. Including what was in the report, if you found it useful?

A. If it was useful, we'd have used it.

Q. Do you have any personal recollection of discussing with Mr. Wood, the purpose of the penalty phase and what kind of information would be important to present?

A. I don't recall any conversation. I'm sure there was one. But I don't recall it, if that's what [58] you want to know.

Q. What about with the family members?

A. I don't recall.

Q. You don't recall telling them what kind of information you needed to get from them?

A. No, I don't. I don't recall.

Q. Would you have put any witnesses on the stand without—

A. I would never put a witness on the stand unless I know what that witness is going to say.

Q. You answered my question before I asked it. Thank you. If you had had any information about abuse or mental health problems, would you have presented it at the penalty phase?

A. Sure.

Q. So those are things that you think would be relevant to the penalty phase?

A. I do.

Q. If you had information about domestic violence in Mr. Wood's family or actual physical abuse to Mr. Wood, would you have presented it?

A. I don't know whether we would have presented evidence to that effect or not. I remember there was some family problems. I just don't recall.

Q. Would you have if you'd had that [59] information?

A. If there had been family abuse on Holly Wood, sure we would have presented it.

Q. But, again—and I think we've already been over this in Dr. Kirkland's report. Do you still have that up there, sir? Can you turn to Page 3? That's going to be Page 242 in the clerk's record of Dr. Kirkland's report. That first paragraph, the end of the first paragraph, can you read that portion?

A. He denies any history of serious injury or disease. He has no history of seizure disorder, head injury, or headaches. He denies any history of hospitalization. He has never taken medication.

Q. In the next paragraph down, he also specifically denies to Mr. Kirkland sexual and physical abuse or any history of criminal victimization.

A. Where are you at now?

Q. I'm at the second paragraph on that same page, Page 3, the bottom of it.

MR. HOWLEY: Objection, Your Honor. Is she asking what Mr. Kirkland said? I don't know what the question is here.

A. Therefore there is no disorders? Is that what you're talking about?

Q. [60] Yes, sir.

A. Present that would detract from any potential ability to appreciate the criminality or wrongfulness of behavior at the time of the alleged offense.

Q. On Page 3, that second paragraph, the last two sentences. You're on page—no, Page 3 of that report you have in front of you. Didn't Mr. Wood, in fact, specifically deny any sexual or physical abuse or history of criminal victimization to Dr. Kirkland?

A. He did.

MR. HOWLEY: Objection.

THE COURT: Overruled.

Q. (Ms. Anderson) Would that not have influenced evidence that you would have presented at the

penalty phase knowing that Mr. Wood had made these specific denials to Dr. Kirkland?

A. Would I have brought it out at the sentencing phase? Is that what you're asking?

Q. Wouldn't this concern you if you were trying to present evidence, the fact that he specifically denied it to Dr. Kirkland—

A. It would.

Q. —just months before the trial?

A. Correct.

[61] MS. ANDERSON: Judge, I have no further questions. I'm just going to grab that report. Thank you, Mr. Dozier.

REDIRECT EXAMINATION

BY MR. HOWLEY:

Q. Mr. Dozier, were you present when Dr. Kirkland spoke with Holly Wood?

A. I don't recall.

Q. Do you know how many times Dr. Kirkland spoke with Holly Wood?

A. I do not.

Q. Do you know when he spoke with Holly Wood?

A. I do not.

Q. Do you know where he spoke with Holly Wood?

A. I don't recall. I don't know whether it was here or the state penitentiary or where. It wasn't in my office.

Q. Do you know how long he met with Holly Wood?

A. I do not.

Q. Did you, in fact, make a determination not to present evidence based on anything you read in Kirkland's report?

A. I don't recall.

Q. Now, I think you said that you did not handle the appeal?

A. [62] I think we handled the first part of the appeal. I could be wrong on that.

Q. But at some point, someone else handled part of the appellate process?

A. Correct.

Q. I think you were asked a compound question before. You were asked whether it was Capital Resources or Equal Justice Initiative. Do you recall which organization it was?

A. On the last aspect of it, I don't recall which group handled it. I just remember some group took it forward for us.

Q. Did you give that group any of your files?

A. I could have.

Q. Do you recall them asking for your files?

A. I don't recall. I'm sure they probably asked for my files or Frank's files or Trotter's files. I just don't recall.

Q. Do you recall meeting with two law students who were working on Holly Wood's case?

A. Sure do, from New York.

Q. Do you recall them asking you for your files?

A. I don't recall them asking me for my files. I mean, if they asked me, I probably told them they [63] could have whatever I had. I don't know whether they got any of those files or not. I don't even recall when that was. Was that before the fire or after the fire? I don't recall.

Q. When did the fire happen?

A. I don't recall that. I mean, within the last, I'd say, two years.

Q. Do you recall telling these law students that you had sent your files to the people handling the appeal?

A. No.

MS. ANDERSON: Objection, Judge, leading.

THE COURT: Overruled.

A. No.

Q. (Mr. Howley) Now, I'd like to talk to you about your investigation for the suppression hearing. What did you do to investigate facts for use in the suppression hearing?

A. Well, we had Pete do his investigation, the investigator. And based on what Holly Wood had told us and based on what we had discovered from the police department, law enforcement, we tried to use what we could to suppress whatever evidence we could. I mean, I don't remember any specifics. I mean, it was based on individual investigations and so forth.

Q. [64] Do you recall doing anything to investigate any childhood problems that Mr. Wood may have had?

A. That Mr.—somewhere, like I told you, in my mind there was testimony from someone that Holly Wood had a bad childhood. I don't recall who it came from. Maybe that was part of the evaluation with the psychologist or whatever, but I don't think he discovered any childhood problems. It might have came from family members or somebody else. I don't recall.

Q. Did you interview any potential witnesses about childhood problems that Mr. Wood may have had?

A. I'm sure we did. I don't recall, but I'm sure we did.

Q. Looking at these two individuals who were mentioned, TC and Douglas, did you conduct any investigation to determine who they were?

A. Only from Holly Wood and the information we received from him and found out that they lived in Coffee County or some where like that. We couldn't never ascertain their whereabouts.

Q. When you say we, who in particular did this investigation?

A. Well, me and Frank, all of us. And I think Pete even tried to—the investigator tried to get up with them. I don't know whether he ever did or [65] didn't. But I mean, that was based on Holly Wood's own information to us was in his mind that the victim and these two individuals had got to arguing over drugs or something like that. And they were the ones that he felt like who had committed the murder.

Q. Did you attempt to obtain any criminal records on these individuals?

A. I don't recall.

Q. Do you recall reading the Kirkland report before the trial?

A. I don't recall. I'm sure we did, but I don't recall.

Q. Did you meet with Dr. Kirkland?

A. I don't even recall that. I'm sure Frank or Trotter or some of us did.

Q. Did you have any discussions either in person or over the phone with Dr. Kirkland?

A. I'm sure that they did, if I didn't. I just don't recall. I'm sure one of the attorneys did, if I didn't.

MR. HOWLEY: I have nothing further, Your Honor.

RECROSS-EXAMINATION

BY MS. ANDERSON:

Q. If your files were available, would you have [66] any problems providing his counsel with those?

A. I'd have no problems whatsoever. They could have the whole thing.

Q. Did Wood provide you with a last name for this TC and Douglas?

A. Only name I had was TC and Douglas. That's all I know.

Q. And you don't recall whether you talked to Dr. Kirkland or not?

A. I don't remember. I'm sure I could have. If I didn't, Frank did or Trotter did, I'm sure.

Q. On Page 241 of the clerk's record—and we're back to Dr. Kirkland's report. This portion here under data sources, if you could look at that.

A. (Witness complies.)

Q. Does that refresh your memory?

A. Not really. But I'm sure if he said it, he did.

Q. What does it indicate?

A. Indicates he had a conversation with me over the phone. I just don't recall it.

MS. ANDERSON: No further questions, Judge.

MR. HOWLEY: I have no more questions for Mr. Dozier.

THE COURT: You may step down. May he be

* * *

[68] MS. ANDERSON: No, Your Honor.

THE COURT: Admitted.

MR. HOWLEY: Our next witness is going to be Frank Ralph.

MS. ANDERSON: Judge, if we can at this time, it's become evident that Mr. Wood has retained a psychologist who they plan to call as a witness today. Can we at least get a copy of her CV so we have time to look into her background before she testifies? We've had no notice of this witness whatsoever.

MR. HOWLEY: We'll be happy to provide the CV.

FRANK RALPH

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HOWLEY:

Q. What is your full name?
A. Francis, i-s, Payne Ralph.
Q. And what is your occupation?
A. I'm an attorney.
Q. Where do you practice?
A. Troy, Alabama.
Q. How long have you practiced in Troy?
A. In Troy, twenty-one years.
Q. [69] Did you practice law before that?
A. Yes.
Q. Where did you practice?
A. Montgomery, Alabama.
Q. And how long did you practice in Montgomery?
A. Ten years.
Q. Did you practice anywhere before that?
A. No, sir.
Q. Did you ever represent the petitioner here, Holly Wood?
A. Yes.
Q. When did you represent him?
A. My representation began sometime in 1994.
Q. And what was the nature of the action?
A. Mr. Wood was charged with capital murder. I was appointed, under our system of indigent representation, to assist Mr. Cary Dozier and Mr. Kenneth Trotter in representing Mr. Wood.
Q. What did you understand the nature of your assistance was to be?
A. Well, to do those things that would be necessary in the defense of a capital murder case and

whatever the defense team decided the roles would be for each person.

Q. Did the defense team decide on a role for [70] you?

A. It's my recollection that we did. I cannot specifically call from memory what it was at this time.

MR. HOWLEY: Your Honor, I'd like for the reporter to marked for identification as Number 2 this document.

(Petitioner's Exhibit Number 2
was marked for identification.)

Q. Mr. Ralph, please take a look at Exhibit Number 2. Is that your signature that appears in the middle of the first page?

A. Yes, sir, it is.

Q. Do you recognize this document?

A. Yes, sir, I do.

Q. What is it?

A. It's my attorney fee declaration in this case.

Q. And looking at the second page there, can you tell me what the second page is?

A. The second page is a compilation of hours spent in representing Mr. Wood; however, the out of court preparation only goes to fifty hours because the State had a limit and all the remaining hours were not claimed, which I imagine there's probably another [71] hundred.

Q. Looking at the description of the hours that are on Page 2, does this refresh your recollection at all about what role you took on in this case?

A. Well, not specifically from this document, no. This is really in general terms. But in looking at my file, I know that we spent a great deal of time in looking over the jury questionnaires—the venire. I

remember that. Of course, we had to do a good bit of research just on capital actions. And I remember that I had purchased a book from some place that was quite thick that I looked at and read as my bedtime reading so that I would know exactly how to prepare for this case.

Q. Do you recall if that was an Equal Justice Initiative book?

A. I believe it was.

Q. What do you recall about the division of work among the three lawyers on this case?

A. Well, it occurs to me that we had an investigator that we met with. It seems like prior to the actual trial preparation we had a series of motions that I think Mr. Trotter had prepared. We had a hearing on that. We all participated in that. And it looked to me like there was a duplicative effort [72] until we actually got to the trial. I don't think that we had sat down, because we were in different offices, and actually delineated you take these and I take these. We hadn't really done that. So we were duplicating a lot of that, which was probably beneficial anyway so that we covered everything. But I don't think we actually ever assigned at that stage an aspect of the trial. Later, we assigned to Mr. Trotter, because he seemed more interested in it if nothing else, the punishment hearing. That really was his responsibility to be familiar with Mr. Wood's situation so he could cross-examine the witnesses in that regard.

Q. When you say we assigned Mr. Trotter the punishment phase, who was the we?

A. Well, there would have been—and that's probably stated incorrectly. Mr. Dozier and I, we talked with him. And he was very inexperienced. He was very nervous about this whole case. And it was quite evident just talking with him how troubled he

was by it. So we—Mr. Dozier and myself, if I recall correctly, at some point said to Ken, why don't you do this.

Q. This being the penalty—

A. Penalty stage.

Q. [73] Why do you say he was very inexperienced?

A. Well, I don't think he had practiced law very long at that time. I don't know how long he had, but I know it wasn't long enough for it to meet the requirement, so it was certainly less than five years. It's my impression it was less than maybe a year or so. And you could just tell by talking with Ken that he—he had no courtroom experience. And I think he was as troubled with the aspect of having to be in the courtroom as he was with anything else.

Q. Did you participate in any investigation of evidence to be used in the penalty phase?

A. I did not. I reviewed reports of an investigator that had been hired.

Q. Did you meet with any potential witnesses for the penalty phase?

A. For the penalty phase?

Q. Yes.

A. No.

Q. Do you know who, if anybody, on your trial team did?

A. Ken Trotter is my recollection of handling that entire matter. Cary Dozier may have, but I'm not aware personally that he did.

Let me add something, John. I knew [74] from having prior—from previously representing the boyfriend of the victim's mother, whose name just is not with me—I'm looking through the file.

Q. Would that be a Mr. Hendricks?

A. Yes, Mr. Hendricks. I had represented him, and I knew him, and I did investigate and talk with him and the mother sometime prior to this trial.

MS. ANDERSON: Judge, we're going to object to the relevance of this.

A. That's the extent of outside investigation that I recall other than what had already been prepared and was being prepared by the investigator.

THE COURT: Overruled.

Q. (Mr. Howley) Did you meet with Holly Wood prior to the trial?

A. I don't believe that I saw him but one time prior to the trial, and I can't tell you if it was here at a hearing or if it was in the jail. I don't have a clear recollection. I did not talk with Mr. Wood much at all in the entire case but a few times, of course, during the trial.

And I might add this, he was somewhat uncooperative, sort of in a state of denial during that time. And any time you would ask him something, it was like he didn't believe this was happening.

Q. [75] Well, you say you only met with him once prior to the trial?

A. I think that's correct.

Q. How long did you meet with him for?

A. I cannot—I'd be making it up if I told you. I'm not even a hundred percent sure that I did, but I have a vague recollection of trying to talk with him, but he was basically very non-communicative in those sessions that we would have with him even during the trial. Like I said, he would sit sort of shaking his head in denial that this was going on. And he didn't offer anything.

Q. When did these conversations occur where you say he was not cooperative?

A. Primarily, I remember that we would have conversations or try to have conversations with him during the trial which lasted for—I don't know, a week or more—in one of the jury rooms during breaks. We would ask him about things that were being said to be sure that we had it right from his recollection. We really weren't getting any responses that were helpful. Everything we knew from the reports and the examination that we already had was the same thing. He didn't add much, if anything.

Q. Do you recall any of the questions that you [76] asked him?

A. No. Let me respond to that this way. One of the areas that we had—we were greatly interested in was a comment that he was supposed to have made in a police car being transported from Luverne to Troy with an Officer Fannin, and we asked him. I know I specifically asked him about that several times because personally I had a feeling that it did not occur as it had been testified about. So I asked him about that. I asked him questions about that, but he wasn't real helpful other than to sort of deny that that had ever occurred, which I felt like he was probably being truthful.

Q. Just let me understand here, you thought he wasn't helpful because he denied that it occurred?

A. No. Most of the time when we would ask him questions, he wouldn't even answer us. He would just—see, I can't recall exactly what he was focused on, but it was like he didn't even want to talk to you about what we were here about. That particular matter involved an out of court statement in the presence of a police officer that was used as an admission. And it's almost like—it was almost like—I

don't even think the movie coincided, but I recall every time I see that movie "My Cousin Vinnie" when the young man [77] is in the police officer's office and he said I killed the clerk? And they take that as a confession. You recall that, I hope.

And it was almost like he had made a statement like that in the back seat of the car. And I can't—without going through here and finding it, I don't remember the words. But I asked him about that several times to see if he actually had made a statement of that nature. My recollection of his responses were that he did not make that statement or did not recall making that statement.

Q. Now, you said you didn't feel that statement had occurred. Why did you reach that conclusion?

A. That's sort of a very personal matter because I've known this police officer for many, many years—

MR. CRENSHAW: Judge, we object. This is all matters that were brought up at the trial. And really it doesn't matter what Mr. Ralph believes about anything in terms of whether he believes that Wood made a statement or not.

MR. HOWLEY: Your Honor, if they're going to stipulate that nothing that Mr. Ralph believes is relevant for questioning here, I don't think they can ask Mr. Ralph any of the questions they asked of Mr. [78] Dozier.

MR. CRENSHAW: I didn't say that. All I said was his own personal beliefs about whether this matter where a police officer testified to the opposite. This previous judge has already heard this information and has made rulings upon it. That's the basis of my objection.

THE COURT: Sustained.

Q. (Mr. Howley) Among the three lawyers, were any of the lawyers considered the lead counsel?

A. Mr. Dozier would have been. He was the first in the case and had—he actually gave me the background matter. The case had begun prior to my involvement in it, and he had had the contacts already with the investigator. He had met with Mr. Wood and had made perhaps some other interviews. And they had undertaken the preparation of the various pretrial motions. So, yes, he would have been actually in charge.

Q. And did you know where Mr. Dozier and Mr. Trotter kept their offices?

A. Yes.

Q. And what did you know about their office situation?

A. In regard to their relationship between [79] themselves, or just where it was physically?

Q. Well, where they were.

A. They were on the Highway 231 in the same office that Mr. Dozier is in now next to the Radio Shack building.

Q. Sitting here today, is there any aspect of the case that you think you or any member of your trial team could have handled better?

MR. CRENSHAW: Objection. This is irrelevant. There needs to be a specific question directed to a specific claim.

THE COURT: Sustained.

Q. (Mr. Howley) Do you think there's anything that you could have done better—you being the whole trial team or any member thereof could have done better at the penalty phase of the trial?

MS. ANDERSON: Objection, Your Honor. He already testified he had nothing to do with preparing for the penalty phase of this case.

A. Now, I was in the penalty phase.

THE COURT: Overruled.

A. I didn't prepare the penalty phase.

MR. CRENSHAW: Objection to use of the word "better". It's a vague word. And certainly he might could have thought that he could have done something [80] better. I'll just object to the vagueness of the question.

Q. (Mr. Howley) How do you think the penalty phase was handled?

MR. CRENSHAW: Objection. That's irrelevant how he thought the penalty phase was handled, Your Honor. That's your decision.

THE COURT: Sustained. If you want, he can respond to the prior question.

MR. HOWLEY: Yes, please, Your Honor.

A. Well, I believe that we should have, in retrospect, hired somebody to do a better investigation of the crime scene with regard to the aspect of whether or not there was a burglary for the underlying offense giving rise to—

MS. ANDERSON: Judge, that's unresponsive to the question that was asked.

THE COURT: He asked about the penalty phase, not the guilt phase.

A. Oh, I thought it was the prior one, Judge Well, yes, the penalty phase, I don't think that Mr. Trotter—and it's no disrespect to Mr. Trotter—brought out

enough of Mr. Wood's background through enough witnesses of the type of upbringing that he had had.

Q. [81] (Mr. Howley) What did you know at the time of trial about his background and upbringing?

A. Well, I didn't know a great deal at that time. But I felt like there were more circumstances in his background that were potentially mitigating that were not explored from what I had had the opportunity to see and observe and in the brief conversations that we had. Some of that I gained just from listening to some of the witnesses themselves and what they said. I knew there was more.

Q. Which witnesses are you referring to?

A. I can't recall who. But there was several, I think, witnesses that testified about him. And I'm not sure who put them on. I know that, of course, his cousin testified. And it seemed like that there was a great deal left unsaid about his background.

Q. Do you recall his father testifying?

MS. ANDERSON: Judge, I'm going to object. They have not established any personal knowledge of Mr. Wood's background from this witness.

A. I recall his father. I think

THE COURT: Overruled.

A. I believe his father testified at the hearing, the penalty stage.

Q. (Mr. Howley) Do you recall anyone else from [82] his family testifying at the penalty stage?

A. You know, my recollection is so vague about that. I think there may have been another person, but I'm not a hundred percent sure. I was just left with the impression that it seemed inadequate given the circumstances.

MR. CRENSHAW: Your Honor, I object and move to strike.

THE COURT: Sustained, granted, struck.

A. Well, if I could review my notes, I probably could get more of that.

MS. ANDERSON: Judge, we would just like to be provided a copy of whatever he's using to refresh his memory.

MR. HOWLEY: I would, too, Your Honor.

Q. (Mr. Howley) What are you looking at, Mr. Ralph?

A. I'm just going through part of the file that I pulled. Somebody had asked me for access to this file. This file, which is in a file box, you know, three feet long, had been stored, and I actually couldn't find it during the time that somebody—I think your office had requested it, and we finally came up with it. Most of it seems to be—a lot of the bulk of it seems to be a lot of the appellate [83] work. I know there's a whole box of that. What I'm looking at here is just the file that I pulled out that contains a lot of motions. It's obvious that this file has been gone through either by me or somebody else.

Q. When did you locate that file?

A. The first time I saw this file was Friday after I was subpoenaed. And I asked my office staff if they had ever located the file because I remember sometime back in the early summer somebody was asking for it. And I had asked them to find it, and it had been put up. We weren't even sure if it was available. They found it, and I asked them Friday after I saw the subpoena. And they said yes, it's upstairs in the file room in a big file box.

Q. Now, is this the complete file that you found on the Wood case?

A. I don't think it's the complete file. The one I'm holding in my hand is certainly not. What's in the box, I really don't know. But it looks to be—it looks to be appellate matters. There's lots of appellate record and briefs and what not in there.

Q. Did you handle the appeal?

A. No, sir.

Q. Did you communicate with the lawyers who [84] handled the appeal?

A. They kept us informed, and they put our name on part of it, and they sent us copies. And seems like that's how we accumulated all of that.

Q. What is in the file that you have brought to court today?

A. In front of me?

Q. Yes.

A. This file has obviously been gone through. It contains some correspondence with the Court of Appeals, from the attorney general's office on the appeal. It's got bits and pieces, some motions from the trial. I don't know why this file is in the condition that it's in. But my recollection is that we had a request by a person that—

MS. ANDERSON: Judge, I'm sorry. I have to object to this narrative about the status of his file. I mean, he's brought the file with him.

Counsel can evaluate it and look at it. We don't need him to list the contents of the file at this point. I mean, they'll be able to have access to it now, and I'm not really sure what the relevance of each document that—

MR. CRENSHAW: Judge, they could have had a subpoena duces tecum issued for this file a long time

[85] ago. If they're trying to assert in any way that they've done their responsibility in just filing this general request for the file—and that's according to this Mr. Ralph here. But, again, they could have filed a subpoena duces tecum, and apparently they could have done that since May since they've known about this hearing.

THE COURT: Sustained.

Q. (Mr. Howley) Mr. Ralph, may we have that file?
A. Sure.
Q. May we have access to the rest of the files that you have back at your office?
A. Yes.

MR. CRENSHAW: I think that's Your Honor's determination whether they can have the file or not. They've had three months.

A. I offered them the file, Judge, back when they first called me. And if I could have located it, I would have given it to them then. This file, I believe, has been gone through by somebody from the office in Montgomery that did the appeal. And how much of it is not here, I don't know. But it's obviously been gone through. It's not in order. It's been taken apart. And I don't really—I do remember [86] somebody from that office coming down here. But what there is here, I certainly would make available to either party.

THE COURT: At this point, I don't perceive anything for me to rule on. That's between—your access to that file, short of you needing a court order, is between counsel.

MR. HOWLEY: Thank you. I have no more questions of Mr. Ralph.

CROSS-EXAMINATION

BY MS. ANDERSON:

Q. Good afternoon, Mr. Ralph. My name is Katie Anderson. I'm with the attorney general's office. I just have a few questions to ask you.

A. I returned your call by the way.

Q. I was probably here. Thank you. I appreciate it.

Let me start out by getting some background information on you. How long—I assume you're admitted to the Alabama State Bar?

A. Yes.

Q. How long have you been admitted to the bar?

A. Thirty plus years.

Q. And how long have you been in private practice?

A. [87] All but about—let's see—maybe five of those years.

Q. And I apologize, you might have said before. What were you doing those other five years?

A. I was an assistant attorney general.

Q. Did you prosecute any cases in that position?

A. The *DeWight versus Stickney* and all the mental health litigation in Federal Court back in the seventies.

Q. What percentage of your private practice before you represented Mr. Wood was dedicated to criminal cases, if you could just give me an estimate?

A. 25.

Q. How much experience have you had with handling felony jury trials?

A. A number? Percentage?

Q. Could you give me an estimate?

A. An estimate of what?

Q. How many cases you handled.

A. Oh, I'm sure. I've handled hundreds. Now, wait a minute. That would be incorrect as to jury trials. Felony juries, 50.

Q. Had you had any experience in any capital cases before you represented Mr. Wood?

A. [88] No.

Q. Are you aware that Mr. Dozier did have experience with representing capital defendants before he represented Mr. Wood?

A. I believe I do. I did, yes.

Q. And you considered him lead counsel in this case?

A. Yes.

Q. You, yourself, mentioned a notebook. Did you say from Capital Resources?

A. Not a notebook, a big volume, a thick volume that we purchased from them.

Q. Could you describe that book for me, please?

A. It's a soft bound book. I think it's entitled "Handling Capital Cases in Alabama".

Q. What it contains, though, what information you were gaining from that notebook or book.

A. Lots of information regarding motion practice, techniques for handling various aspects of capital trials.

Q. Does that include the penalty phase?

A. I don't know that it does or doesn't.

Q. Was that helpful? Did you rely on that book while handling Mr. Wood's case?

A. It was helpful. I can't say that I relied [89] on it entirely, but it was helpful.

Q. You've been provided a copy of your attorney fee declaration sheets?

A. Yes.

Q. Could you turn to the second page of that?

A. Yes.

Q. You've listed your out of court preparation, and it says at the bottom remaining hours exceed the limit and are not listed. What did you mean by that statement?

A. Well, the fee schedule at that time—I don't know what it is today—only paid fifty hours out of court for capital representation. So it was pointless to continue just listing it on this document. There would have been, I believe, another hundred or more hours spent in this case.

Q. So this is not representative of the complete amount of hours you spent working on Mr. Wood's capital case?

A. No. It is as to the in court.

Q. Yes, sir. Okay. Thank you. Is there any notation in here about you interviewing Mr. Wood?

A. I don't think there's a specific notation about any interviews.

Q. So you did not cease working on Mr. Wood's [90] case once you hit that fifty hour out of court cap, did you?

A. Oh, no.

Q. And were you dedicated to this case? I mean, were you dedicated to Mr. Wood's case?

A. In what sense?

Q. In representing him as his attorney.

A. Certainly as a lawyer to carry out my obligation to see that he was represented, yes.

Q. Well, isn't the oath that you take and being an attorney more than just representing them as an attorney? Doesn't it ask for more than that?

A. Well, I don't have to—I don't have to know whether he's guilty or not. I never ask the question of guilt or innocence of any client that I represent.

Q. But the code requires more than you showing up in the courtroom when the trial starts?

A. Oh, certainly.

Q. Did you treat Mr. Wood any differently than any of your paying clients?

A. No. In fact, he got a lot more time than paying clients get.

Q. From you?

A. From me and from the other two because of [91] the severity of the punishment.

Q. You all knew what was at stake, didn't you?

A. Sure.

Q. Okay. You've discussed some about your relationship with Wood. You said that you may have interviewed him once. You're not a hundred percent sure?

A. You know, I just believe that I had—or I attempted a conversation with him prior to the trial. I know I had several during the course of the week of the trial, several a day. In fact, I sat next to Mr. Wood for the entire week. We talked with him during the course of the trial as things would happen.

Q. Was he cooperative then?

A. In my best recollection, it was a state of denial. I don't think he didn't want to cooperate. I think he just refused to accept the reality of what was happening.

Q. Why do you think that?

A. Just through responses that I got. And I can't tell you specifically what they were, but it's a sense—we're going back six years. It was just a sense of the way he would handle an inquiry. I remember a lot of this type of motion, sitting with his head down and shaking his head (indicating). [92] That's my recollection of him.

Q. Were you present every time Mr. Dozier and Mr. Trotter met with Mr. Wood?

MR. HOWLEY: Objection as to foundation, Judge.

Q. Is it possible that Mr. Dozier and Mr. Trotter met with Mr. Wood when you were not there?

A. I'm sure it is.

Q. What about the investigator? He could have met with Mr. Wood as well; is that correct?

A. I'm sure he did.

Q. And if their testimony or time sheets indicated that, then that would be the more accurate source than your testimony here, correct?

A. It would indeed.

Q. Have you had a chance to review the report that Dr. Kirkland did in this case? Do you recall that? That was the psychological evaluation.

A. Dr. Kirkland is from Montgomery?

Q. Yes, sir. Well, I'm not sure where his office is located. But he's the one that evaluated Mr. Wood at defense counsel's request.

A. I don't see that report in my file, but I'm sure that I reviewed it along with—probably from a copy that Mr. Dozier had. Mr. Dozier had a file, I [93] believe, that was quite a bit more comprehensive than mine.

Q. Do you recall Dr. Kirkland reporting in his report specific conversations he had with Mr. Wood about his attorneys, you?

A. I don't recall Dr. Kirkland's report.

Q. I'm going to provide you with a copy of that. If you could turn to Page 5 of that report, Mr. Ralph, under the competency to stand trial portion and go about four lines up from the bottom of that first large paragraph. There are specific references to his relationship with counsel. Could you review that, please?

A. I see that.

Q. Are you familiar now? Does that remind you that Dr. Kirkland spoke with Mr. Wood specifically about counsel?

A. Well, I didn't recall that. I mean, we never had any disagreements with Mr. Wood.

Q. Well, what exactly did Mr. Wood tell Dr. Kirkland according to that report? What does that report indicate?

MR. HOWLEY: Objection, Judge. The report speaks for itself.

MS. ANDERSON: Judge, I'd like to be able to [94] question him about this, and I think it's important to bring out. It's pretty specific about discussing the case in detail with his attorneys, which directly contradicts what this witness has stated prior to this.

THE COURT: Overruled.

A. The report says that he thought he had a good relationship with his attorneys and that he had been able to discuss his case in detail with his attorneys.

Q. (Ms. Anderson) So if Mr. Wood felt that he was able to discuss the case in detail, couldn't it be that he was discussing the case in detail at times when you just weren't there?

A. Could be.

Q. So Mr. Dozier and Mr. Trotter would probably be the best people to testify about how Mr. Wood was in relating to them in their interviews with Mr. Wood?

A. Well, I'm certain that whatever their perception of it would be would be their perception. It would be more accurate of what I could tell you of their conversations with him.

Q. That's what asking you. Wouldn't they be better people to testify?

A. Certainly. But as to the conversations that [95] I had with him, I didn't feel like I was getting anything.

Q. Could it be that there was nothing for him to provide you as far as information; that he was guilty of this offense and he knew it?

MR. HOWLEY: Objection, Judge, speculation.

THE COURT: Sustained.

Q. (Ms. Anderson) Did you find any evidence to present in his defense at the guilt phase?

A. Did I find any evidence to present? I didn't handle the—

Q. You didn't handle the guilt phase or the penalty phase?

A. Did I find any evidence?

Q. Yes. Was evidence presented during the guilt phase on his behalf?

A. My recollection is there was not. I think there should have been.

MS. ANDERSON: Judge, objection. That wasn't the question that was asked. Please strike as nonresponsive.

THE COURT: Sustained, struck.

Q. Now, you mentioned something about the motion to suppress. Were you personally involved—

A. I didn't mention that. I just mentioned [96] that we had motion hearings. I didn't say anything about a motion to suppress.

Q. Were you at all involved in the preparation for that suppression hearing?

A. No, ma'am.

Q. So you didn't have any conversation with Mr. Wood regarding his testimony at that hearing?

A. Mr. Dozier handled that, if I'm correct.

Q. So Mr. Dozier would be the best person to testify about preparing for the suppression hearing

and preparing Mr. Wood for testifying at the suppression hearing then, wouldn't he?

A. He or Mr. Trotter would have done that, yes.

Q. So they would be better to testify about that? They would have more accurate testimony about that?

A. Yes.

Q. Now, you had indicated that you were involved in the guilt phase of the trial. What exactly did you do in preparation for the guilt phase or handling the guilt phase in this case?

A. I can't tell you what exactly I did other than what we would normally do in any case preparation. We prepared voir dire. We spent a great deal of time on the jury questionnaire. We prepared [97] our opening statements. We knew who the State's witnesses were going to be, and we talked about them, what elements—what aspects cross-examination would cover if the testimony led to those particular areas. I know we talked a great deal about the crime scene investigator because we were concerned about the break-in or the supposed break-in, the burglary. We were interested in whether or not there was fingerprint evidence, what they had done. I think it was Detective Brown and—I can't remember the other fellow's name, and I know him. But I remember we spent a good deal of time on that because we thought that was a critical element of the case.

Q. If I can interrupt you, when you say spent a great deal of time on that, could you elaborate on that? What did you do?

A. Well, we went over what we knew that had occurred. We went over what we thought the testimony would be. We looked at the case law, and we decided how we would try to attack, that evidence and what we were going to try to bring out.

Q. Did you ever interview any of the State witnesses?

A. Talked to the police officers.

Q. Which police officers?

A. [98] Well, I remember Detective Brown. I remember Detective Fannin and the one that does the pictures—does the pictures and picks up the shells and does all that crime scene, and I can't remember his name. Stark Laney. I think it was Stark Laney.

I talked with them just to, you know, get a background on what they said happened. I did not talk to the forensic people, but I remember reviewing forensic reports.

Q. Could you dispute Mr. Dozier's testimony that he did talk to all the State witnesses?

A. No. I think he probably did.

Q. Could you dispute the fact that the investigator also spoke to State witnesses?

A. Certainty not.

Q. So if there's something that you personally didn't handle, it's very likely or it's possible that someone else on this trial team, which consisted of three attorneys and one investigator, would have been handing that?

MR. HOWLEY: Objection. Calls for speculation.

A. Well, as a matter of fact, that's what happened. There was an investigator—

THE COURT: Overruled.

A. [99] And there was the other attorneys that were doing that. And I took it upon myself to talk to witnesses that I knew would be here just to see if I thought that the sense of their testimony from the conversations that we had was correct to see because I knew the importance of that particular area of the

case, to see if there was a chink in the armor, if you will, or a way to attack it.

Q. So you had a strategy to really undermine the State's presentation of its case?

A. On that aspect, the burglary.

Q. Now, talking about the penalty phase, you had no involvement in the preparation for or investigation of the penalty phase?

A. Well, I don't think that's entirely correct. I remember that we met and talked about it. We decided that Ken Trotter would handle it. In fact, my recollection is we told Ken Trotter to handle that early on; that that was going to be his responsibility.

Q. If Mr. Dozier was involved in the investigation for the penalty phase, could you dispute that?

A. No. Because they had a separate office, and I don't know what they might have done.

Q. [100] So Mr. Dozier would be the best to testify or make a statement about—or excuse me—be the best source of information as far as what his involvement was with the penalty phase as opposed to your testimony?

A. Certainly as to his involvement. But I think Ken Trotter is probably the only one that can really testify about that.

Q. But Mr. Dozier would be better to testify about his own involvement?

A. About his, certainly.

Q. Did you have anything to do with the investigation of it? Did you personally do any investigation of the penalty phase?

A. Seems like I talked to a sister or two.

Q. Do you know the names of those sisters?

A. No, I don't. But I recall talking with a sister, maybe more than one; or maybe it was a sister and his father.

Q. Do you know when you spoke with them?

A. Sometime prior to that proceeding.

Q. Was that in an effort to gain information regarding the guilt phase or penalty phase?

A. It was in the penalty phase. It was in regard to that. I was just—and I don't remember [101] when or where I was when I did that, but I do remember having that conversation with them. To specifically tell you why I did that, I knew Mr. Trotter had talked to them. I had some conversations with Mr. Trotter. I don't know if he asked—

MS. ANDERSON: Judge, this is going beyond the scope of the question. I think he's answered my question.

A. I can't recall. I can just tell you that I know there was a reason that I did it.

Q. Do you recall what questions you asked them?

A. No.

Q. Do you have any personal information whether the investigator talked to Mr. Wood's father?

A. No personal recollection of that.

Q. Do you have any personal knowledge of whether Mr. Trotter talked to Mr. Wood's father?

A. Well, I know he put him on as a witness.

Q. But do you know if he ever questioned him prior to his testimony at the penalty phase?

A. No, I don't have personal knowledge of that.

Q. Do you have any personal knowledge of whether Mr. Dozier questioned Mr. Wood's father before he testified?

A. I have no personal knowledge of that.

Q. [102] So you don't know?

A. I don't have personal knowledge that they did or didn't.

Q. Was the sister's name perhaps Johnnie Pearl Wood?

A. I'd be guessing.

Q. Was it someone who actually testified at the penalty phase that you spoke with?

A. My recollection is it is.

Q. What about Lillie Jean Wood?

A. None of the names that you could mention without me going through there would ring a bell.

Q. Well, if I told you that the record reflects that Johnnie Pearl Wood and Lillie Jean Wood were the two sisters that testified on his behalf at the penalty phase, would you have any reason to dispute that?

A. No. Because my prior testimony was I thought that I had talked with two sisters. Maybe it wasn't, two, I said, maybe it was a sister and a father. But I thought I remembered two sisters of his that I talked with.

Q. Do you remember what information they provided you?

A. No.

Q. [103] Do you remember any information about Mr. Wood's background that you knew of personally?

A. No.

Q. Well, then how do you know that the evidence that was presented was not sufficient; that there was other evidence out there?

A. Because sitting where you're sitting right there today, I remember that evidence coming from this witness stand and not feeling like it had been adequate.

MS. ANDERSON: Judge, I'm going to object. If he didn't know any other information, then how does he have the basis to make that judgment?

A. Because anybody has more of a background and history than what I heard.

MS. ANDERSON: Judge, this is an objection. I'm not asking you a question, Mr. Ralph. I'm objecting to your response. I specifically asked him about his knowledge, and he said I don't know.

THE COURT: Sustained.

Q. (Ms. Anderson) Did you have any contact at all with the investigator in this case?

A. No.

Q. So you have no personal knowledge about what he was even doing?

A. [104] That's not correct. No, not personal knowledge. I had knowledge from Mr. Dozier. Mr. Dozier had employed him.

Q. Well, that wouldn't be personal knowledge. That would be information you received.

A. That's correct. I just said that I had no personal knowledge, but I had contact with Mr. Dozier because he employed him.

MS. ANDERSON: Judge, again, I object. I asked him if he had any personal knowledge about what the investigator did in this case. I would ask that the witness be limited to answer the questions that are asked.

THE COURT: Sustained.

Q. (Ms. Anderson) To clarify for the record, do you have any personal knowledge about what the investigator did in this case?

A. Does his report count? That's personal knowledge. I had personal knowledge of his report.

Q. Okay. Go ahead.

A. I had personal knowledge of his report.

Q. But you had no contact with him or conversations with him at all regarding what he was doing?

MR. HOWLEY: Objection. Asked and answered.

[105] THE COURT: Overruled.

A. I'm not certain that I didn't have a conversation with him.

Q. (Ms. Anderson) So when you said no before, that was inaccurate?

A. I can't recall actually whether we talked or not. I'm not going to say I didn't.

Q. Wouldn't it be a fair statement, since you have testified here today that you had limited participation in the penalty phase, that Mr. Trotter or Mr. Dozier would be better witnesses to testify about the preparation of that portion of the case?

A. Well, that's a true statement, yes. I can add to that, too.

Q. That's okay. You answered the question. Thank you.

You suggested here today in your testimony that Mr. Trotter only had one year experience when he was appointed to this case?

A. I don't know exactly how many years experience he had. I don't know where he was before he came to Troy. I think he'd been here about maybe a year or less when he was appointed. I know that he didn't have five years experience.

Q. Isn't that required to be appointed on a [106] capital case?

A. That's why I got appointed. That's why I was appointed because he did not have five years because I asked the same question: Why do we need three lawyers in here. These are not cases that you run out trying to get when you have a decent civil practice.

Q. Again, you said Mr. Wood didn't suffer because he was an indigent client; correct?

A. Would not on my behalf.

Q. And didn't you testify that, in fact, he probably got more of y'all's time because of the nature of this case?

A. Got more of mine.

Q. And you can't speak for how much time Mr. Dozier and Mr. Trotter put in, can you?

A. No.

Q. Now, you expressed that Mr. Trotter was concerned about his ability to handle the penalty phase of this case?

A. Mr. Trotter was nervous about having to make a presentation. He told me that.

Q. Without telling us what he related, because that would be hearsay and we would object to that, but if you felt that he was unprepared or unqualified, why [107] would you allow him to handle a penalty case for a client that you are appointed to by this Court to represent?

A. Because his apprehension was about being in front of a jury. It was not about his being prepared. I thought that he had done his work. He was just concerned about having to make a presentation. I remember him asking would you handle these witnesses.

MS. ANDERSON: Judge, I object. He's answered my question.

THE COURT: Sustained.

Q. (Ms. Anderson) Is it unusual or unprofessional for an attorney to get a little nervous before presenting a case in front of a jury?

A. No. And I told him that.

MS. ANDERSON: I have no further questions.

MR. HOWLEY: I have a few, Your Honor. And first I'd like to move into evidence Exhibit 2.

THE COURT: Admitted.

REDIRECT EXAMINATION

BY MR. HOWLEY:

Q. Mr. Ralph, did you get paid for the hours out of court and in excess of fifty?

A. No.

Q. [108] How did you determine which hours to list on this exhibit and which hours not to list on the exhibit?

A. Oh, I'm sure I kept some sort of a sheet somewhere that listed dates and times. And when I got to a point that it was in excess, I probably quit doing that.

Q. Your recollection is that you quit recording your hours at some point?

A. Yeah, I think so.

Q. Did you have any role in the preparation of the Kirkland report?

A. No.

Q. Did you have any role in the retention of Dr. Kirkland?

A. No. I think he was appointed by the judge.

Q. Did you meet with Dr. Kirkland?

A. No.

Q. Did you ever discuss his report orally with him?

A. With him?

Q. Over the phone, for example.

A. No, I did not.

Q. Do you know how long Dr. Kirkland met with Holly?

A. [109] No.

MS. ANDERSON: Judge, we're going to object. He's already said he doesn't have any knowledge about Dr. Kirkland's evaluation of Mr. Wood.

THE COURT: Overruled.

Q. (Mr. Howley) Do you know when they met?

A. No.

Q. Do you know where they met?

A. No.

Q. I just want to be clear on one thing you said before. The timing of when you think you talked to one or more of the sisters and maybe the father, was that after the guilt phase?

A. Yes.

Q. Do you recall talking to them before the guilt phase?

A. I think that I talked with them during the guilt phase as well. They were here at some point, and I'm certain that—because I did not go to wherever they live, so I'm, certain that they were here and available.

Q. What was your strategy to undermine the State's burglary case?

A. Well, there was no proof of a forced entry. In fact, there was no proof of any nature of an entry [110] by anybody. And that was what we had determined we needed to get across to the jury; that there was no witness that saw Mr. Wood around that home. There was nothing to show that the door had been forced open. There was no fingerprint evidence taken of any of the doors that led from that door to the door where the victim was found to show that that underlying necessity of the case wasn't present.

Q. Who told you that you were appointed because Mr. Trotter did not have five years experience?

A. Well, I'm not certain of that. It just seems like I probably asked Judge Barr when I learned of this, and he might have told me that Mr. Trotter didn't have five years experience. And I think the statute requires two lawyers with five years experience.

Q. What work did Mr. Trotter do to prepare for the penalty phase?

MS. ANDERSON: Objection, Judge. He's not the person to ask this question of unless he has personal knowledge of Mr. Trotter's preparation.

THE COURT: Only answer from your personal knowledge.

MR. HOWLEY: Your Honor, if I may, he testified that the reason he was not concerned about [111] Mr. Trotter's preparation for the case and his nervousness was because he was confident that Mr. Trotter had done an investigation necessary to prepare for the case. What I'd like to know is what he knew at the time about Mr. Trotter's preparation.

THE COURT: And I'm not sustaining. I'm allowing him to respond.

A. Ken and I had a telephone conversation that I recall where—it was prior to the hearing where he went over with me what he had and asked if that was—

MS. ANDERSON: Judge, I'm going to object to hearsay. He can talk about what his personal knowledge is of what Mr. Trotter did, but he cannot testify about what Mr. Trotter said to him.

MR. CRENSHAW: Judge, furthermore, the investigator wrote a report on who was interviewed or not. This witness seems to be very eager to lay Mr. Trotter on some kind of a, you know, a sledge hammer block.

MR. HOWLEY: Your Honor, I don't think there's a question pending at this point.

MR. CRENSHAW: Judge, we'll just object to the testimony involving this witness talking about Mr. Trotter. The best witnesses for what they did is Trotter and the investigator.

Q. [112] (Mr. Howley) What did you personally know about Mr. Trotter's investigation for the penalty phase at the time of the penalty phase?

A. Well, I know that we had a conversation. I know that he had worked on it. I know that he was concerned about it.

MS. ANDERSON: We're getting into hearsay again, Judge. I mean, he's relating a conversation they had over the telephone—

MR. HOWLEY: Your honor, it's not hearsay. It's not for the truth of the matter.

MS. ANDERSON: Excuse me. I need to be able to put my objection on the record.

MR. HOWLEY: It is for the fact of whether or not he was told—it's not for the truth of the matter. It's for whether or not he told him—he was told that.

MS. ANDERSON: Judge, it seems to me that's exactly what they're trying to do. They're trying to bring out what Kenneth Trotter did in this case through this witness, and that's improper. If they want to know what Kenneth Trotter did, then they should bring him in here and ask him. But he's already stated that he was not involved; that Trotter handled it. If they want to ask him if he can recall [113] why he felt confident or not—but we're getting into telephone conversations between them or conversations in person, and that's hearsay.

THE COURT: Sustained.

A. Let me say this to that man's statement, I thought Mr. Trotter was a very competent, very intelligent, bright young man. And I don't mean to caste any doubt on that.

Without going into what we talked about, we did talk about it, you know. He did call me at least once, and I'm sure probably more than once about what was going on because he was—seemed to be pretty involved in that particular hearing. And my sense, as I previously testified, he was nervous about it.

MR. HOWLEY: Your Honor, I'm going to ask that all that be stricken. There's no question for it to be responsive to.

THE COURT: Granted, struck.

Q. (Mr. Howley) Do you have any personal knowledge of any witnesses or potential witnesses that Mr. Trotter interviewed before the penalty phase began?

A. No.

MR. HOWLEY: No further questions, Your Honor.

[114] MS. ANDERSON: I just have a few questions, Judge.

RECROSS-EXAMINATION

BY MS. ANDERSON:

Q. Just because you have no personal knowledge, that doesn't mean that he didn't interview witnesses; is that correct?

MR. HOWLEY: Objection. Calls for speculation.

MS. ANDERSON: Well, I'm trying to elaborate on the response, and I think I'm entitled to do that.

THE COURT: Overruled.

A. I wouldn't know.

Q. (Ms. Anderson) That's what I'm saying. You're saying you don't know what he did; correct?

A. Other than from sitting there and watching it, I don't know.

Q. So you have no idea who made the decisions about what witnesses were going to testify? Were you not privy to that?

A. I remember that we talked about who was going to testify, but I think it came more in the form of these are going to be the witnesses.

Q. I have a question—you were asked some questions about the report that Dr. Kirkland prepared [115] after being appointed by the Court to evaluate Mr. Wood. And your response to many of those questions was—when you were asked, I think, do you know when it was, do you know where it was, was no. Is no, I do not know and never knew; or is that no, I just don't recall at this time?

A. I'm not sure I understand your question. What are you asking me?

Q. I can rephrase the question. I apologize. Do you recall being asked questions about Dr. Kirkland's report?

A. Yes.

Q. Do you recall being asked the specific question, do you know where this interview was conducted?

A. Yes.

Q. And your response was no; correct?

A. Correct.

Q. Do you mean that you don't know and have never known, or that you just don't recall at this time?

A. I don't think I knew where this was—where the interviews were conducted.

Q. Did you ever review the report that Dr. Kirkland submitted?

A. [116] I remember seeing it, yes.

Q. So if it indicated in the report where the interview was conducted and when and how long, you would have had that information then, wouldn't you?

A. I'm sure if I read through there, it probably would refresh my recollection.

Q. In fact, Mr. Ralph, if you turn to Page 2 of Petitioner's Exhibit Number 2, that's your declaration sheet there in front of you. Do you have that in front of you? Doesn't it state on 5/24/94 review psychological material?

A. Yeah.

Q. And let's see. It looks like Dr. Kirkland submitted his report on the 13th of May. So isn't it possible that that's the psychological material you were looking at?

MR. HOWLEY: Objection. Calls for speculation.

Q. (Ms. Anderson) Was there any other psychological material in this case?

A. To my knowledge, no. But I thought the question was did I know where it had taken place, the interviews.

Q. I apologize, I was trying to give you an example of the specific questions he was asking, and I [117] was trying to break it down to just one.

A. Oh, no. I recall this. I remember seeing this, going over it. In fact, I remember—I believe counsel and I sat down and went over this and reviewed it.

MS. ANDERSON: Thank you, Mr. Ralph. I have nothing further, Judge.

MR. HOWLEY: I have nothing further, Your Honor.

MS. ANDERSON: Judge, again, we would ask that he not be released because we may have to call him as rebuttal.

MR. HOWLEY: Your Honor, we'd like to call Douglas Brown.

DOUGLAS BROWN

was sworn and testified as follows:

DIRECT EXAMINATION

BY MS. MICHAELSON:

Q. What is your name?
A. Doug Brown.
Q. And are you employed?
A. Yes. I'm assistant principal at Luverne High School.
Q. And how long have you been there?
A. This is my twenty-eighth year.

IN THE TWELFTH JUDICIAL CIRCUIT COURT
OF ALABAMA
CIRCUIT COURT OF PIKE COUNTY

No. CC-94-7

HOLLY WOOD,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

SECOND AMENDED PETITION PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE FOR RELIEF FROM JUDGEMENT

Petitioner, HOLLY WOOD, now incarcerated on death row at Donaldson Correctional Facility in Bessemer, Alabama, petitions this Court for relief from his unconstitutionally obtained conviction and sentence to death. In support of this amended petition, Mr. Wood states the following:

PROCEDURAL HISTORY

1. Mr. Wood was indicted in Pike County on November 16, 1991 for the capital murder of Ruby Lois Gosha in violation of Ala. Code § 13A-5-40(a)(4).

2. In October 1994, Mr. Wood was convicted of capital murder and the jury subsequently returned a 10-2 death recommendation. On December 9, 1994, the trial court, finding three aggravating factors and

rejecting all mitigating factors, sentenced Mr. Wood to death.

* * *

detrimental to the defense. The Judge made unfavorable and erroneous rulings throughout the pretrial and trial proceedings which damaged the defense.

156. The judge made the following unfavorable, erroneous rulings at trial and during pretrial proceedings: during the suppression hearing Judge Barr refused to consider discrepancies in police testimony regarding the timeliness of the warrant as evidence of Fourth Amendment violation (TR. 175); at trial Judge Barr refused to give a manslaughter instruction (TR. 847); during guilt phase Judge Barr gave instructions that rehabilitated impeached state witnesses (TR. 941); Judge Barr gave an instruction on expert witness that encompassed the testimony of lay witnesses as well as legitimate expert witnesses (TR. 941). These adverse rulings individually and cumulatively caused substantial prejudice to the defense.

III. TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF MR. WOOD'S TRIAL, AND THIS INEFFECTIVENESS RESULTED IN THE UNJUST AND UNCONSTITUTIONAL IMPOSITION OF THE DEATH PENALTY:

157. Trial counsel was grossly ineffective at the penalty phase of the trial, and the jury subsequently' returned a 10-2 death recommendation, which was then followed by the trial court when it sentenced Mr. Wood to death. Despite the wealth of mitigating factors—both statutory and nonstatutory—trial counsel called only three witnesses, all of whom testified only briefly. Trial counsel failed to call a single mitigation

expert, either to testify about Mr. Wood's mental health problems or about the long-term psychological consequences of his traumatic childhood.

158. Trial counsel's deficient performance prevented the jury and the trial court from hearing and considering an abundance of mitigating evidence, and thus denied Mr. Wood a fair and accurate penalty phase determination as required under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law. Quite simply, trial counsel was unable to fulfill its constitutionally mandated obligation to present a defense at a critical phase of Mr. Wood's capital trial.

A. Trial Counsel Failed To Adequately Independently Investigate All Possible Avenues To Uncover Mitigating Evidence Critical To Mr. Wood's Penalty Trial Defense

159. A full investigation of the history of the client by trial counsel is absolutely essential preparation for the penalty phase of a capital proceeding. The trial court and jury are constitutionally required to consider as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438.U.S. 586, 604 (1978). This includes any evidence about the defendant's history and life that may be considered by the jury or judge as a mitigating factor. *Woodson v. North Carolina,* 428 U.S. 280 (1976). Thus, Mr. Wood was entitled to have all aspects of his background, family life, medical history, school history, and any other life experience that may be considered mitigating evidence presented to the jury

and judge at the penalty phase of his capital trial. Counsel for Mr. Wood fell far short of this constitutionally required mandate.

160. In order to have prepared properly for the penalty phase of Mr. Wood's capital trial, counsel should have obtained complete and accurate information relevant to Mr. Wood's medical history, mental retardation, educational history, employment and training history, family and social history, his correctional history, and any religious or cultural influences. American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases., 11.4.1(A)(2)(c) (adopted by the ABA house of delegates Feb. 7, 1989).

161. Counsel in Mr. Wood's case completely failed these minimal requirements of an adequate investigation. "At the heart of effective representation is the independent duty to investigate and prepare [the client's easel" *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). Counsel is under a clear duty to thoroughly investigate a client's background in preparation for a capital penalty phase, and the failure to do so precludes the finding that the absence of a penalty phase defense was strategic. *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995) (Holding counsel ineffective for failing to request state hospital records, school records, social service records, and failing to contact defendant's sister, neighbor, or social worker); *Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986) (concluding ineffective assistance of counsel where little effort was made to investigate possible sources of mitigation evidence); *Douglas v. Wainwright*, 714 F.2d 1532, 1556 (11th Cir. 1983) ("possible trial strategy can never include the failure to conduct a reasonably substantial investigation."); *Blanco*

v. Singletary, 943 F.2d 1477 (11th Cir. 1991) (counsel did not attempt to contact family members or prepare for the penalty phase until the trial was underway, and failed to put on any mental health mitigating evidence); *Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1985) (presumption of prejudice where trial counsel made no effort to prepare for the penalty phase of a capital trial).

162. Trial counsel called only three family members at the mitigation stage, none of whom were prepared adequately to testify. Trial counsel did not personally interview any of the family members. The investigator hired by defense counsel interviewed only Mr. Wood's father and two of Mr. Wood's sisters. The investigator interviewed these family members months before the trial. Trial counsel did not talk to them about testifying at the mitigation phase until after the trial had started.

163. The lack of preparation is reflected in the family members' disjointed testimony. For example, Mr. Wood's oldest sister testified that she did not know the possible penalties or punishments for capital murder. (TR. 1019). When asked about the family's feelings regarding Mr. Wood's situation, Mr. Wood's other sister testified that the family "is just real pleased with him [Mr. Wood] now." (TR. 1034). The third family member, Mr. Wood's father, J.P. Wood, was so hard of hearing that he had trouble understanding and responding to the questions, and only testified very briefly. (TR. 1001-03).

164. Many family members were available to testify about critical mitigation, but were neither interviewed nor contacted. Neither the trial counsel nor their investigator interviewed any of Mr. Wood's

teachers or administrators, school peers, or social workers.

165. In this instance, effective preparation and investigation by defense counsel would have revealed a host of mitigating factors, which should have been presented at Mr. Wood's penalty phase. This failure constitutes ineffectiveness as it cannot be characterized as strategic, and it therefore requires that this Court reverse Mr. Wood's sentence of death.

1. Trial Counsel Failed to Develop Evidence of Mr. Wood's Poverty

166. Defense counsel failed to investigate and present information about Mr. Wood's difficult and impoverished childhood. Defense counsel did not investigate the Wood children's living conditions or their experience of isolation and neglect.

167. Mr. Wood's sisters were available to testify about the family's poverty. Defense counsel asked limited questions of Mr. Wood's oldest sister, Johnnie Pearl, during the penalty phase of trial. In response to these questions, Ms. Wood testified that as children they lived with their mother, then with an aunt, and finally by themselves. (TR. 1005). Ms. Wood testified that when they were living with their aunt, sixteen people lived in the house (TR. 1006), and that when they were living by themselves they had unmet financial needs. (TR. 1012). Trial counsel did not inquire about living conditions in any of these households. Generally, counsel asked no questions to elicit details of the family's deprivation.

168. Had counsel prepared mitigation witnesses or conducted an adequate investigation, Johnnie Pearl, as well as Mr. Wood's Other sisters, would have testified about the difficult living conditions experienced

by the children with each caretaker. Johnnie Pearl would have told the jury that when the siblings lived with their mother, they lived in a primitive house in the country. She would have described the house as divided into a kitchen area, a living area, and a narrow sleeping area. The floor was made of wood boards, and the dirt ground was visible through the floor boards. Mr. Wood's sisters remember that they had only two beds, and slept four to a bed. They didn't have an eating table or more than a few chairs, so some of the children had to eat supper sitting on their beds.

169. Mr. Wood's sisters would have explained that their house had no running water, plumbing, or indoor bathrooms. In order to get water for cooking and bathing, the children were responsible for walking almost a mile downhill to a water pipe. The children had to fill jugs of water and walk back up the hill with the heavy water.

170. Johnnie Pearl would have told the jury that their mother was a sharecropper and what food they did have came almost exclusively from the property. Often for dinner the children would have only milk and cornbread.

171. The children did not have any toys and received only oranges for Christmas when living with their mother. Mr. Wood's sisters would have testified that since they lived in the country, and had no car, their mother would usually go into town only once a month when someone offered to drive them. In town, their mother would sometimes go shopping, but more often than not, this involved just putting items on lay-away. The children were not able to pick out their own clothes and had little clothing.

172. Mr. Wood's sisters would have testified about impact of their poverty on their childhood. Mr. Wood's youngest sister would have told the jury that she was called "the stinky girl" because of their abject poverty and that their family was teased for being so poor and from the country. She would have also explained to the jury that the stigma associated with their poverty continued through adulthood. She would have related that after she graduated from high school multiple businesses refused to hire her based on the stigma of their last name.

173. Their poverty also meant that the children had to work on the farm. The sisters would have recounted that they woke up at 4:30 in the morning in order to do their chores before leaving for school around 7:00. The children were responsible for household chores, hauling and chopping wood, hoeing planting, picking vegetables, and feeding the hogs and chickens. They resumed work in the afternoon immediately after getting out of school, and worked until nightfall. Mr. Wood's youngest sister would have told the jury that she members helping with the planting and yard work before she was five years old.

174. The family's poverty also prevented them from access to medical care. Mr. Wood's oldest sister would have told the jury that their mother was too poor to receive prenatal care from a doctor or clinic, and that the Wood children were born at home. When the children were sick, their mother or grandmother prepared home remedies. Betty Simmons, the children's mother, was sick for an extended period of time before she became so ill that she was taken to the hospital. Mr. Wood's oldest sister would have explained that their mother avoided seeking medical treatment

for her ultimately fatal case of pneumonia earlier because she had no money to pay a doctor.

175. After their mother's death, the children went to live with their Aunt Sarah. Although Johnnie Pearl testified that many people lived at their Aunt Sarah's, defense counsel did not question Ms. Wood further about life at their Aunt's house. Johnnie Pearl Would have told the jury that like their mother, their aunt was a sharecropper. The children's work responsibilities continued at their aunt's house, and they worked again before and after school.

176. About one year after moving in with their Aunt Sarah, the Woods' older half-sister moved from Kentucky to assume responsibility for caring for the children. Mr. Wood's sisters would have testified that this sister had children of her own and had to work full-time in a factory to support the children. She received almost no assistance from their father, and thus had to support the seven Wood children and her two children, along with herself, on the factory wages and government assistance.

177. Mr. Wood's sisters, if asked, would have discussed the difficult poverty that continued when their half-sister moved out and they lived on their own. They did not have any furniture initially and had to rely on donated furniture. Again, the children shared only a few beds for all of them. Peers were available to testify that the Wood children did not have many clothes and were short on money. Community members would have also testified to the jury that the common perception was that the oldest sister had to maintain liaisons with older men in order to provide for her siblings.

178. Trial counsel failure to investigate adequately and prepare witnesses to present the family's poverty prejudiced Mr. Wood by denying the jury information that would have presented Mr. Wood in a sympathetic light. The jury was denied the opportunity to consider as mitigation the way Mr. Wood and his family were ostracized for their poverty. The jury was also denied the opportunity to consider as mitigation the effects of the heavy work load and years of deprivation on Mr. Wood's personal development. The difficulties faced by Mr. Wood and the harsh community reaction may have persuaded the jury to consider granting Mr. Wood life without parole as an act of mercy for an individual who was shown very little mercy throughout his difficult life.

179. Courts have long recognized failure to investigate and present evidence of poverty as the type of failure that prejudices the defendant and renders counsel ineffective. *See Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987) (finding that failure to develop available mitigation including evidence of poverty and poor living conditions "clearly met the prejudice requirement"); *Cunningham v. Zant*, 928 F.2d 1006, 1017 (11th Cir. 1991) (holding "poverty stricken background" is the type of mitigation trial counsel should have prepared and presented); *see also, Rose v. State*, 675 So. 2d 567 (Fla. 1996) (finding, counsel ineffective at penalty phase for failing to prepare and present mitigation, including poverty); *Eutzy v. Dugger*, 746 F. Supp. 1492 (N.D. Fla. 1989) (same); *Collier v. Turpin*, 177 F.3d 1184, 1202 (11th Cir. 1999) (same) trial counsel prejudiced Mr. Wood by failing to investigate and present evidence of Mr. Wood's poverty and poor living conditions. Mr. Wood should consequently receive a new penalty phase trial.

2. Counsel Failed to Investigate Mr. Wood's Early Exposure to Violence and Physically Abusive Childhood

180. Counsel was ineffective for failing to contact Mr. Wood's relatives, friends, peers and educators who would have testified and provided a plethora of mitigating information regarding the physical violence and abuse that Mr. Wood was exposed to throughout his childhood and into adulthood. Counsel failed to investigate or present the abundant evidence of the abuse Mr. Wood and his siblings suffered during the penalty phase of the trial. Counsel's total failure to investigate, develop, and present such critical mitigation as violent abuse rendered their performance constitutionally deficient.

181. Available mitigation would have shown that virtually all of Holly's caretakers, guardians, role-models were volatile and abusive, using violence as the primary mechanism for gaining control over their environment and relationships. Holly's father was feared by his contemporaries and his aggression and violence were legendary in the Luverne community. Indeed, the Wood children are familiar with their father's reputation as, "someone to steer clear of unless you wanted to get your throat cut." J.P. Wood had been the aggressor in numerous violent altercations, including a shootout with his ex-girlfriend's husband and a stabbing of another man in a juke club. J.P.'s abusiveness toward his mistresses added to his reputation as a total aggressor. J.P. stabbed one of his mistresses, the mother of his daughter Nell Zena, in Nell Zena's presence. Nell Zena was five years old when she witnessed her father's brutality.

182. Holly's mother, Betty Simmons, was reputed to have had violent and unstable tendencies as well.

For instance, she retaliated to J.P.'s abuse by shooting at him and shooting bullets into his truck. Clem Wood would have testified that Holly and his siblings witnessed Betty's volatile behavior. Many men, including J.P. Wood, feared Betty because she was always ready with her gun when there were signs of provocation.

183. In addition, Holly's siblings would have testified that Holly was exposed to domestic violence during his formative years and throughout his life. Holly's primary male role-models, and later on his peers, used violence as the primary means of controlling their intimate relationships with women.

184. J.P. Wood did not live with Betty Simmons and his children, but he visited regularly. Holly and his siblings would often hear J.P. yelling and harassing their mother. Frequently, the verbal abuse would escalate and they'd hear J.P. punching and slapping Betty. On many occasions J.P. took Betty down the road or into the car and beat her. The kids could hear the altercation from the house.

185. On other occasions, J.P. beat Betty in the house, in the room adjacent to the children's bedroom. One sister would have testified that she would lie awake afraid for their mother's safety but too afraid of their father to come to her aid. After an abusive night, they woke up to find their mother dejected and covered with bruises. This pattern of domestic violence continued until Betty's death.

186. It was believed among community and family members that the abuse that Betty Simmons suffered at the hands of J.P. Wood contributed to her death at the youthful age of thirty-one.

187. Holly's exposure to domestic violence continued through adolescence. During the three year period when Holly and his sisters lived with their older sister Nell Zena, they saw Nell Zena battered by her husband. Nell Zena's husband was an alcoholic. When he felt frustrated he lashed out at Nell Zena physically. Holly recalled one occasion where his brother-in-law hit Nell Zena so hard that he broke her nose.

188. Holly's peers in adulthood showed similar patterns of violence toward their intimate partners and women relatives. For instance, Holly's cousin, with whom Holly spent a great deal of time as an adult and in the months preceding the crime, was a notorious batterer.

189. Available witnesses including Holly's siblings would have testified that Holly was not only a witness to violence between adults in his life, but the subject of extreme violence and brutality meted out by his care-givers. Friends, relatives, and teachers were available to testify to the physical abuse that Holly suffered as a child.

190. All of Holly's care-givers were physically abusive towards him. Holly's mother, Betty Simmons, regularly beat Holly and his siblings with switches or belts for the slightest infraction. Holly was whipped regularly for wetting the bed. Holly and sisters were whipped when they were remiss in their chores. Because the children were young. the beatings felt very painful. After Betty's whippings their limbs were covered with welts which lasted for days.

191. Betty Simmons' violence toward her children was extreme. On one occasion Betty Simmons shot at Holly and his half brother, Clem Wood, because

they failed to get water from the well. Holly was only a young boy when he experienced this brutal attack by his mother.

192. Holly was also beaten as a small child by his grandmother Millie Simmons. Holly remembered his grandmother giving him and his sisters excruciating beatings when they were very small. Holly remembers Millie Simmons' beating him with an extension cord when he was as young as five years old. Betty Simmons was not the only member of the elder generation who relied on extreme violence as the primary source of discipline. Holly's aunt, Sara Harris, with whom he lived for nearly a year after his mother died, was also abusive.

193. Holly's most abusive caretaker was Nell Zena, his oldest half-sister, who cared for him from age 11 to 14. Nell Zena beat Holly and all of his siblings with such severity and frequency that the Wood siblings, to this day, are traumatized by the memory of that period. In fact, one sibling described this period as torture.

194. At Nell Zena's the abuse was constant, someone was always being beaten. Typically Nell Zena would take the children into a room, lock the door, so they could not flee; command them to take off all of their clothing, and proceed to beat them with a belt or an extension cord for about twenty minutes.

195. Holly's younger sister would have testified that Holly received the lion's share of Nell Zena's abuse. Holly suffered severe physical and psychological abuse from his older sister. Nell Zena beat Holly with extension cords regularly.

196. On one occasion Holly tried to escape Nell Zena's wrath by locking himself in a room. Nell

Zena, a two hundred pound woman, broke the door down and beat Holly for forty minutes. This time, when Nell Zena was done, the extension cord was literally dripping with Holly's blood. Nell Zena was noticeably exhausted after this beating and Holly was covered with blood—he could barely move.

197. On another occasion Nell Zena and her husband dragged Holly outside, tied him to a tree with rope and beat him with a belt until he nearly passed out.

198. Nell Zena demoralized Holly, inflicting extreme emotional as well as physical pain. Holly's younger sisters, Willie Pearl and Mae Ola, would have testified to times when, after severely beating Holly, Nell Zena would lock him out of the house for extended periods. Holly would bang on the door and beg and plead to be let in. Holly's begging was useless; although Holly's sisters desperately wanted to let him in they feared Nell Zena's retaliation. On these occasions Holly usually had no alternative but to stay with other relative, until Nell Zena was ready to let him come back home. His sisters would bring him clothing and necessities during these sporadic periods of homelessness.

199. Nell Zena also publicly humiliated and traumatized Holly when she beat him with a belt in school in front of his peers and teachers. Holly was mortified and depressed after that incident and dropped out of school shortly afterward.

200. Holly's brother and younger sisters would have revealed that Holly's relationship with Johnnie Pearl, his second oldest sibling, was also contentious and violent during the period when Johnnie Pearl was his guardian. Holly and Johnnie Pearl fought

and argued incessantly. When this relationship became unmanageable, Johnnie Pearl too turned to violence; she would lock Holly out of their home and not allow him to come back home until he was ready to take a beating. On one occasion Johnnie Pearl retaliated against Holly by setting his car on fire.

201. Had counsel investigated Mr. Wood's only childhood and social background, they would have been able to provide the jury with an explanation of why Mr. Wood might have relied on violence to cope with emotional difficulties or relationships with loved ones. Counsel would have been able to explain the root causes of Holly's abusiveness toward women as well as the source of his aggression and anger management problems.

202. Counsel would have also had the opportunity to introduce an expert to give the jury a clinical perspective on the long-term effects of child abuse and domestic violence and interpret Holly's behavior with a clinical framework. An expert in long-term consequences of child abuse would have explained that, generally, physical childhood abuse has a close correlation to later adult aggressive conduct. An expert would have presented the specific behavioral consequences of child abuse and explained that the abused child has missed important socialization experience that may interfere with adolescent and adult relationships. Rather than learning and integrating health and appropriate social skills, a child who experiences violence and rejection as the predominant modes of interpersonal relationships may develop primitive defense mechanism, impaired impulse control, and self-destructive behavior. When viewed within this clinical framework Holly's behavior would have been more comprehensible to the jury.

203. All of this information would have been relevant to the jury's assessment of the appropriate punishment. Mr. Wood's devastating history of prolonged and severe abuse could have persuaded the jury to feel sympathetic and could have provided an explanation to the jury of why Mr. Wood may have acted as he did. Had this evidence been presented the jury probably would have given it particular consideration, especially since the judge specified that difficult family history or evidence of mental disturbance constitutes relevant mitigation evidence (TR. 1078).

204. History of child abuse and exposure to violence is classic mitigation evidence Justice Rehnquist has explained the obvious relevance of a history of abuse for understanding adult behavior in *Santosky v. Kramer*, "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745, 789 (1982). Numerous courts have found trial counsel ineffective at the penalty phase for failure to develop mitigation evidence, including evidence of abuse. *See e.g., Jackson v. Herring*, 42 F.3d 1350 (11th Cir.); *Heiney v. State*, 620 So. 2d 171 (Fla. 1993).

205. Trial counsel's failure to develop and present evidence of Mr. Wood's childhood abuse and poverty is particularly troubling given counsel's knowledge of warning indicators of abuse and neglect such as overcrowding and lack of a steady caretaker. *See Mathis v. Zant*, 704 F. Supp. 1062, 1063 (N.D. Ga. 1989) ("The court finds trial counsel's conduct particularly objectionable because Coney failed to seek detailed

information about his client's past even though his cursory investigation revealed that Mathis had a troubled upbringing.") Counsel's complete failure to present lay and expert testimony of Mr. Wood's prolonged history of abuse rendered defense counsel ineffective and prejudiced Mr. Wood. This court must now vacate Mr. Wood's death sentence.

3. Counsel Failed to Uncover Evidence of Fetal Alcohol Syndrome and Failed to Investigate Holly's Early and Sustained Exposure to Alcohol and Alcoholism

206. Trial counsel based its penalty phase mitigation argument in large part on the assertion that Mr. Wood was drinking on the day of September 1st. ® 1065-1068). Despite counsel's reliance on this fact, trial counsel failed to develop evidence of Mr. Wood's early exposure to alcohol, family history of alcoholism, and his own personal history of alcoholism. Trial counsel also failed to develop evidence of the degree of Mr. Wood's intoxication on September 1st because of its inadequate investigation. *See supra*, Part II.D.

207. At the penalty phase trial counsel introduced a police report from 1:00 a.m. on September 2nd that indicated Mr. Wood had been drinking before his arrest. As a result of their limited investigation and presentation of Mr. Wood's drinking on September 1st, counsel mistakenly downplayed Mr. Wood's state of intoxication that day in the closing argument. Trial counsel told the jury to "Remember that he was drinking. If he was drinking from 11:00 o'clock at night there is some alcohol in his system." (TR 1064). A thorough investigation would have developed a context of alcoholism and underscored the large vo-

lume of alcohol in Mr. Wood's system on the night of the arrest.

208. Had counsel adequately investigated for mitigation they would have discovered the culture of intoxication that pervaded Holly's background. Holly's siblings would have testified that Holly was exposed to alcoholism from infancy through adulthood. Counsel would have also discovered that Holly's guardians took inadequate steps to steer him away from alcohol and alcoholism; rather they encouraged his participation in this lifestyle. Generally, a counsel would have discovered that nearly all of Holly's adult role models were afflicted with alcoholism.

209. Mr. Wood's older sister would have testified, if asked, to Wood's probable exposure to alcohol in the womb. Holly's older sister remembered that their mother drank through her pregnancies and that, because of limited resources and extreme poverty, she received no prenatal care. Trial counsel's failure to adequately investigate Mr. Wood's family history with alcohol prevented counsel from learning of the probability that Mr. Wood suffered from fetal alcohol syndrome at birth.

210. Holly was surrounded by alcohol and alcoholics during his formative years. His father, J.P., was a known moonshine distributor and Betty Simmons, his mother (J.P.'s mistress), sold a large portion of J.P.'s supply. Holly's first home was known as a local whiskey house. People came to Betty's house to purchase whiskey day and night. Often, there would be several intoxicated people sitting on Holly's porch and in Holly's house buying and consuming whiskey until they were falling down drunk.

211. This lifestyle was not unusual for the Simmons family. Betty's parents were both alcoholics and they ran a "juke joint" out of their house in the 1950's; Betty was essentially carrying on a family tradition. Betty did not discourage her children from getting involved in the family business. Betty required her 12-year-old daughter, Johnnie Pearl, to assist her in selling whiskey. Betty went to sleep every afternoon at four o'clock, usually after drinking whiskey during the day. In the evening Johnnie Pearl was responsible for supplying the customers with whiskey.

212. Holly spent the first ten years of his life in a whiskey house unsupervised and inundated by alcohol and alcoholism. Not surprisingly, Holly began to experiment with alcohol at an early age. By the time he was nine years old Holly had already been hospitalized for overdosing on alcohol. Holly got so drunk at age nine that he lost consciousness for several hours and had to have his stomach pumped.

213. Holly's exposure to alcohol did not by any means subside with his mother's death. Holly's eldest sister and guardian, Nell Zena, was married to an alcoholic. Rather than shielding Holly from this influence, Nell Zena insisted that Holly accompany her husband, Bunny, on his alcoholic excursions. At age eleven Holly remembers going to bars in Tuscaloosa with his alcoholic brother-in-law, Bunny would get extremely drunk and boisterous. Holly would spend the evening keeping him out of fights and driving him back to Luverne. Of course, Holly was completely unsupervised and drank excessively on these trips as well.

214. Holly's relationship with his alcoholic Uncle Buck Simmons was similar. The Woods remember

their Uncle Buck Simmons as an alcoholic. The Woods frequently visited their Uncle in Florida during their childhood: alcohol was always present and Uncle Buck was always intoxicated during their stays. As adolescents Holly and his sister Mae Ola would visit their Uncle and spend much of the visit drinking with him and his girlfriend—a woman who was so addicted to drugs and alcohol that they had to remind her to eat.

215. Holly's easy access to alcohol continued into adulthood because his father continued to distribute whiskey and most of the adults in his life kept plenty of liquor around. Holly always had access to an endless supply of alcohol.

216. Available mitigation evidence would have shown that almost all of the influential people in Holly's life were dependent on alcohol, including Holly's grandmother who was notorious in the community for her extreme dependency. Alcohol was the one constant in Holly's life.

217. Practically all of Holly's adult role models and peers used alcohol to cope with their poverty and dejection.

218. Most of Holly's adult relationships were suffused by alcohol and substance abuse. Holly's companions were essentially drinking partners. For instance, when Holly spent time with his half brother Clem Wood or his Cousin Calvin Salter drinking and drug use was a key element in their interaction. Holly's intimate relationships were similarly structured around alcohol and drug use.

219. Holly had relatives and friends who would have testified that Holly's reaction to alcohol was abnormally volatile—even pathological, and that when

Holly was intoxicated he became irrational and delusional. *See supra* Part II.D.

220. Counsel's failure to investigate and present this evidence was prejudicial. Counsel could have used this background of alcoholism to contextualize the crime and persuade the jury that Mr. Wood was likely to have been highly intoxicated at the time of the crime and was therefore less culpable and warranted a lesser penalty.

221. Counsel was ineffective for failing to present expert testimony. An expert would have interpreted the long term behavioral consequence of early and sustained exposure to alcoholism. An expert have also given the jury a clinical understanding of the mitigating impact of Holly's alcoholism and intoxication on the day of the crime. An expert would have testified that alcoholics are often like the mentally deficient in that they become incapable of reflective thought and may be unable to form specific intentions. Counsel, aided by an expert, could have used the available mitigation to explain to a jury how alcohol combined with Holly's anger management issues, history of abuse and domestic violence could lead him to take extreme measures to try and gain control of an oppressive situation.

222. Counsel's failure to present this in depth evidence of alcoholism and intoxication was clearly prejudicial. *See Rose v. State*, 675 So.2d 567 (Fla. 1996) (finding counsel ineffective for failing to prepare and present mitigation including evidence of chronic alcoholism); *Heiney v. State*, 620 So. 2d 171 (Fla, 1993) (finding trial counsel ineffective in penalty phase for failing to prepare and present evidence of chronic substance abuse and use of drugs and alcohol at time of offense and chronic physical and emotional abuse

as child.); *Eutzy v. Dugger*, 746 Supp. 1492 (N.D. Fla. 1989) (holding trial counsel ineffective for failing to prepare and present evidence where available mitigation would have shown that defendant began drinking at age 12 and had a long history of alcohol among other mitigation). Mr. Wood should receive a new sentencing phase trial as a result of counsel's deficient and prejudicial failure to develop and present significant evidence of Mr. Wood's history of alcoholism and his intoxication at the time of the crime.

4. Trial Counsel Was Deficient for Not Developing Adequately Mr. Wood's Childhood Traumatic Experiences With Death

223. Trial counsel also failed to investigate adequately the psychological effects of Mr. Wood's specific childhood traumas. During the penalty phase, defense counsel elicited only minimal details about significant traumatic experiences. The only information trial counsel presented to the defense about the early death of the children's mother was through non-substantive questions Johnnie Pearl about when their mother died, how old Holly was when she died, and whether the children received any counseling. (TR. 1005, 1010), Counsel's inquiry into Samuel Wood's (Holly's younger brother) death was similarly uninformed. (TR. 1010-1011).

224. A mitigation expert could have presented crucial information about the impact on Holly of his mother and brother's death. Defense counsel inadequately interviewed Holly about his experiences and thus failed to learn about the extreme anxiety Holly felt after his brother's death. Holly was in a car accident with his brother that caused his brother to die. Holly witnessed his brother's death. Before leaving

that day, Holly and his brother had fought about who would get to sit next to the window. Holly felt as a result of where they were sitting, his brother died, while he lived.

225. After his brother's death, Holly struggled with feelings of guilt that he should have died along with his brother. Holly also experienced visual hallucinations—ghost-like images of his brother—for months after his brother's death. A mitigation expert could have explained the kind of psychological impact this type of trauma and remorse would have had on Holly at such a young age. She could have explained the magnitude of this type of grief that caused Holly to drive by the graveyard or sit in the graveyard every opportunity he had the following year.

226. Mr. Wood's younger sisters were available to testify about the devastating impacts of the two deaths on the children at such a young age. For example, Mae Ola would have explained to the jury that there was no adult who comforted them, offered them any words of encouragement or love, or even hugged them after the deaths of their mother and brother.

227. In failing to present evidence of this trauma counsel prejudiced the defense. The jury was denied testimony that would have underscored the extraordinarily difficult circumstances of Wood's childhood.

5. Trial Counsel's Performance Was Deficient for Failing to Develop Evidence of Mr. Wood's Mental Retardation and Mental Disability

228. Had trial counsel adequately investigated Mr. Wood's mental health, they would have discovered significant evidence suggesting mental retardation

and mental health problems. Instead of conducting an adequate independent investigation into Mr. Wood's mental health issues and mental retardation, counsel introduced a single, unsupported piece of evidence at the penalty phase—a letter from the State Board of Pardons and Paroles denying Mr. Wood's parole on the grounds that he needed "anger induced, acting out and reality therapy". (TR. 1044).

229. In fact, there was overwhelming evidence of mental disability that counsel should have explored and could have presented. Prior to commencement of the trial Mr. Wood was examined to determine his competency to stand trial by a state-retained psychologist, Dr. Karl Kirkland. ® 239). Dr. Kirkland diagnosed Mr. Wood as in the range of borderline intellectual function. ® 243). Dr. Kirkland's report in turn was based in part on a limited examination two years earlier at Kilby Correctional Facility ® 242-243). The results should have alerted counsel to the likelihood of mental disability and possible retardation.

230. Defense counsel failed to interview any of Mr. Wood's teachers in order to explore this highly relevant mitigation, and failed to interview adequately Mr. Wood's family members would have testified to Mr. Wood's learning disorders. Rather than develop evidence of Mr. Wood's mental retardation and mental health, the defense filed a motion to prevent introduction of any psychological evidence. (TR. 271-74).

231. Mr. Wood's high school special education teacher was available at the time of trial to explain that Holly was placed in special ed because of his low IQ and poor reasoning and reading skills. His teachers could have explained that Holly would be consi-

dered a "slow learner" and "emotionally conflicted" by modern standards and would qualify as a special education student today.

232. Holly experienced great difficulty with math, spelling and reading comprehension and struggled with homework assignments. Holly sometimes attempted to do this homework assignments, but invariably he would find the material too difficult.

233. Holly had a younger sister enrolled in special education classes with him. She had the opportunity to observe Holly's difficulties firsthand. She was available to testify to Holly's problems paying attention and staying focused. During the brief instruction periods, Holly would fidget in his seat and had to get up to walk around the room. Holly could not concentrate during tests or assigned tasks. At other times during the day, Holly would suddenly fall asleep at his desk.

234. Trial counsel failed to investigate adequately the history of mental disabilities in Mr. Wood's family. Had trial counsel adequately interviewed the family members, they would have learned that one of Holly's younger sisters has been diagnosed as mentally retarded, and with attention deficit and multiple sleeping disorders. Counsel would hove also learned that other sisters received treatment for depression and other mental illnesses. Counsel would have additionally discovered a strong family history of mental retardation, present in multiple generations. The extensive presence of mental disability in Mr. Wood's family should have alerted trial counsel to the issue of Mr. Wood's own mental health, a critical area neglected in Mr. Wood's defense.

235. Trial counsel's failure to investigate adequately Mr. Wood's mental health prejudiced Mr. Wood in several ways: First, trial counsel did not request, an independent mental health expert capable of examining Mr. Wood and presenting Mr. Wood's mental illness to the jury in the context of statutory and non-statutory mitigators, as discussed *infra* part III.B. Second, trial counsel did not present any testimony to the jury about Mr. Wood's mental limitations, and in effect denied the jury information critically relevant for sentencing.

236. Evidence of mental retardation and mental disability are areas that courts have recognized as critical mitigation. Multiple courts have awarded new penalty phase hearings based in part on trial counsel's failure to present evidence of mental retardation and learning disabilities. *See Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995) (noting borderline mental retardation as example of kind of undeveloped mitigation requiring a new penalty trial); *see also Rose v. State*, 675 So. 2d 567 (Fla. 1996) (siting the fact that the defendant was slow learner and had a low IQ as factors); *Armstrong v. Dugger*, 833 F.2d 1430; 1433 (11th Cir. 1987) (citing mental retardation as a factor); *Cunningham v. Zant*, 928 F.2d 1006, 1017 (11th Cir. 1991) ("We remain troubled however by trial counsel's performance in preparing and presenting the witnesses they chose and their failure to present certain significant mitigating evidence, e.g. the evidence that the psychologists at Central State Hospital had determined that *Cunningham* was *mildly* retarded). Evidence of mental illness is "classic mitigation". *Perry v. Johnson*, 532 U.S., __ (June 4, 2001) (overturning death sentence for inadequate jury, instructions on the issue of mental retardation); *Zant v. Stephens*, 462 U.S.-885 (1983); *see also, Ste-*

phens v. Kemp, 846 Fo2d 642 (11th Cir. 1983): "[T]rial counsel's failure to investigate, present and argue to the jury at sentencing any. evidence of appellant's mental history and condition constituted an error 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'"); *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995) (counsel's failure to request medical records, interview important family members, neighbors, and social worker resulted in prejudice because counsel therefore could not develop mental health mitigation). Trial counsel's failure to investigate, develop and present evidence of mental retardation and mental health issues resulted in reversible prejudice. Mr. Wood should receive a new sentencing trial.

6. Trial Counsel Was Deficient for Not Investigating Mr. Wood's Educational Background and School Experience

Rather than providing Holly with a nurturing; learning environment, school was another source of rejection and humiliation for Holly. Trial counsel made no effort to contact any of Holly's former teachers or classmates, and thus never learned of the significant mitigating factors stemming from Holly's troubled educational experience. Many of Holly's former teachers and peers are all still working in the Luverne school system and would have willingly provided defense counsel with critical information, including Mrs. Pen, Mrs. Hilda Mattox, Mr. Doug Brown, and Mrs. Alfreda Griffin.

Defense counsel also failed to interview Holly's siblings Mae Ola Wood, Willie Pearl Wood, Lillie Jean Wood, Clemon Wood, and Nell Zena Brown about Holly's childhood and school experience. Clemon and Lillie Jean live in the Luverne area and

would have spoken with defense counsel about Holly's time in school. Mae Ola and Willie Pearl live on the same street in Birmingham, just a few hours away, and also would have provided defense counsel with information. Holly remains in close contact with his siblings and would have given defense counsel the contact information for them, had counsel asked. Finally, defense counsel did not learn important information about Holly's educational experience from Holly or his sister Johnnie Pearl because they did not adequately interview them.

239. For the first years of his education, Holly attended the segregated school in Brantely, Alabama along with his brothers and sisters, and his half-brother Clemon Wood. The school was very primitive, with only a handful of classrooms. The school offered only the bare minimum in terms of equipment and did not provide any special education. In the early 1970's the Luverne area schools integrated and the all-black Brantely school was closed. Holly and his siblings were bused to the k-12 Luverne school.

240. Contemporaries of Mr. Wood were available to testify that integration was a difficult period for black students. Many black students felt that the school administration failed to provide support during the difficult transition, and the new school had low expectations for black students.

241. Holly was in special education for his entire time at Luverne. Holly's sisters Sandra and Mae Ola were also in special education, Mae Ola remembers the intense and constant feeling of shame that haunted the special education students, or the "moles". As Holly's former teachers explained, the special education students were referred to as "moles" who lived in the "mole hole" because the spe-

cial education classrooms were substandard and located in the basement. Part of the classroom was used for storage of items like lawnmowers, which would give off bad fumes, and water would come in through the walls and ceiling whenever it rained.

242. The special education students were isolated from the other students, and taunted by them. Mae Ola remembers that the mainstream children would taunt the special education students when school was released, saying "here comes the moles out of the hole". In order to avoid being ridiculed as they left the basement, some students would try to leave school early by asking to go to the bathroom and not returning, or simply sneaking out.

243. Both students and teachers were available at the time of Mr. Wood's trial to testify to the extremely poor learning environment into which Mr. Wood was thrown. Special education was an unstructured and chaotic environment. Students disabilities ranged from severe mental and physical disabilities to mild learning disabilities. Also the ages of students varied, spanning three consecutive grades.

244. All of the students were placed together in special education with only one or two instructors. The severely disabled students required a lot of attention, as students were sometimes crawling on the floor, banging their heads against the walls, or wandering out of the classroom down the hall. The classroom atmosphere was frequently violent. Holly's younger sister would have testified that there was a lot of paddling and corporal punishment by the teachers.

245. In addition to the challenge of attending school in a violent and chaotic environment where

learning was not possible, Holly faced the trauma of almost complete social ostracization by his peers and teachers. By failing to interview Holly's teachers and siblings Mae Ola and Nell Zena, and failing to adequately interview Holly, defense counsel did not learn that Holly was singled out and humiliated at school throughout his childhood.

246. Holly's youngest sister remembers that the other students ridiculed Holly for being stupid and referred to him as "old dumb Holly Wood". Students teased Holly because of his bad grades and classroom performance. Teachers from Mr. Wood's high school year would have recounted that students called someone "Holly B" to insult them as stupid or undesirable.

247. Petitioner's teachers also would have told the jury that Holly was taunted because as a student Holly Wood always smelled of stale urine. At the time, teachers told students that they should shower to avoid developing a problem like Holly B's. Holly's half brother would have told the jury that Holly routinely wet the bed well past the age of young childhood and tried to blame his siblings to avoid embarrassment.

248. Holly responded to the humiliation of accusations of uncleanliness and stench by compulsively focusing on his own personal cleanliness. Holly's sisters would have described to the jury how Holly as a child refused to play in the dirt or do any activity that would get his clothes dirty, and how Holly obsessively cleaned his own clothes.

249. Holly's sister and half-brother were available to tell the jury that even as a small child Holly kept mostly to himself. They would have explained that he

had few friends in school, and spent more time alone as he got older.

250. Holly's sisters would have told the jury about an instance where Holly was beaten in 'front of the entire class and the teacher by his older half-sister. The entire school learned of the incident almost immediately and all of the students teased him terribly about it. Rather than coming to Holly's aid, his teachers exacerbated the humiliation by continually referring to the beating in class and threatening to call in the sister. His younger sisters would have recounted that Holly stopped attending school regularly after this beating and subsequent harassment.

251. Petitioner skipped school frequently as he got older, and as the taunting and ridicule got worse. Holly was teased by white students and faculty about his hair and dressing style, which did not conform the white aesthetic, and called racial slurs by some of the white students. By the time Holly was in tenth grade he was living with his sister Johnnie Pearl and he rarely attended school. The use of racial slurs and taunting contributed to Mr. Wood dropping out of school in tenth grade.

252. Defense counsel failed to investigate adequately Holly's educational experience and thus remained ignorant of critical factors to Holly's mitigation case. Defense counsel also failed to discover the profound rejection and ostracization Holly experienced from his peers and teachers in the one environment where Holly should have found stability and structure as well as solace from his difficult home life. By failing to investigate and develop the readily available and substantial evidence of Holly's traumatic school experience, defense counsel deprived the jury of information critical to understanding why and

how Holly might have relied upon extreme coping mechanisms. Petitioner's background and development are critical to the "individualized sentencing" the Eighth Amendment requires.

7. Trial Counsel Was Ineffective For Failing To Present Mr. Wood's Relationship With His Son As A Mitigating Factor

Counsel was ineffective for failing to investigate available mitigation that would have shown that Mr. Wood was dedicated to his son. Defense counsel asked only a single question of one witness about Mr. Wood's son, "Would you tell us now, did Holly and Lois, state whether or not they had any children together?" (TR 1032), Defense counsel's questioning fell significantly short of the kind of questioning that would have revealed the importance of Mr. Wood's relationship with his son.

254. Mr. Wood's friends and relatives were available to testify Mr. Wood's devotion to his young son. Had counsel conducted an adequate investigation they would have learned that Holly lived with Ms. Gosha and their son, Holly Jr. during Holly Jr.'s infancy. During that period Holly was very involved in his son's care, and fed, bathed and clothed his son, especially during the periods when Ruby was unavailable. Holly took the baby out for walks and brought him to visit friends and relatives. Holly bonded with his infant son.

255. Friends and relatives would have testified that Holly's son was his pride: when Holly was not with his son he was talking and thinking of his son. Mr. Wood's cousin Clem was available and would have testified that Holly boasted about his son's intelligence, good looks and affection for him. Holly's

relatives would have told the jury that Holly, Jr. followed his dad around, and would light up when his Dad came into the room. During the period when Holly and Ms. Gosha were living apart, Mr. Wood would stop by where Ms. Gosha was living to drop off groceries and supplies for his son, and to try to spend time with his son.

8. Trial Counsel's Deficient Performance Resulted in Substantial Prejudice for Mr. Wood and Requires Reversal of Mr. Wood's Death Sentence

256. Appropriate investigation and presentation of Mitigating factors are key to the type of individualized determinations constitutionally required during capital sentencing. *See Thomas v. Kemp*, 796 F,2d 1322 (11th Cir. 1986). In Mr. Wood's case, trial counsel "presented no More than a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of the character and record of a convicted defendant before the imposition upon him of a sentence of death'." *Collier v. Turpin*, 177 F.2d 1184, 1202, (11th Cir. 1999). A wealth of mitigation, including evidence of abuse, poverty, social ostracization and neglect, mental retardation and mental illness, emotional stress, alcoholism; and a positive father son relationship, should have been developed and presented by trial counsel through readily available witness testimony.

257. Counsel's failure to develop such critical evidence denied Mr. Wood effective assistance of counsel and prejudiced Mr. Wood. *See e.g., Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (finding counsel ineffective for failure to conduct investigation into petitioner's background, which would have revealed childhood neglect, physical abuse, substance abuse,

low IQ, and emotional duress at the time of the homicide). Mr. Wood's constitutional right to effective assistance of counsel has been violated and can only be remedied by a new sentencing phase trial.

B. Counsel Was Ineffective for Failing to Introduce Expert Testimony at Penalty-Phase

258. Trial counsel did not call a single expert witness at the penalty phase of Mr. Wood's trial, and thus failed to present crucial evidence of Mr. Wood's mental health and mental retardation, as well as an analysis of the interaction between alcoholism, childhood trauma and abuse, and mental disability. Trial counsel's failure to investigate Mr. Wood's mental health and evidence of mental retardation denied Mr. Wood effective assistance of counsel. Trial counsel failed to request expert psychological assistance and an independent evaluation of Mr. Wood despite the wealth of information suggesting that such an evaluation would be crucial, and the fact that Mr. Wood was clearly entitled to such assistance under law.

259. Despite the clear signs that Mr. Wood needed expert psychological assistance, defense counsel did not request an independent psychological evaluation until after the guilty verdict. (TR. 967). Defense counsel requested the exam too late for consideration by the jury and was content to simply have the data incorporated into a presentencing report where it would only be considered by the judge. (TR. 967). In making its request, defense Counsel recognized the need for an examination and conceded that counsel failed to investigate Mr. Wood's mental health. (*Id.*).

260. In *Ake v. Oklahoma*, the Supreme Court held that the guarantee of fundamental fairness of the

Due Process clause "at a minimum, assures the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense". *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). The Alabama Supreme Court has interpreted this mandate to require the provision of experts in any field upon a showing of need. *See Ex Parte DuBose*, 662 So. 2d 1189 (Ala. 1995). This constitutional mandate is not satisfied by the provision of a state employ expert. *See e.g., Cowley v. Stricklin*, 92917.2d 640 (11th. Cir. 1991).

261. Trial counsel failed its constitutional duty to investigate Mr. Wood's case by failing to request expert mental health and mitigation assistance. Defense counsel was ineffective for failing to request assistance, and present testimony, of mental experts such as a psychiatrist, a social worker, and a neurologist.

262. Significant evidence was available to defense counsel that suggests Mr. Wood is mentally retarded and suffers from mental illness. As discussed *supra* (III.A.5), former teachers of Mr. Wood would have told defense counsel that Mr. Wood was in special education, and must therefore have tested with a low IQ. Mr. Wood's poor academic performance and grades are other indications of mental disabilities. Mr. Wood's visible eye deformation is an example of a facial abnormality symptomatic of fetal alcohol syndrome and mental disorder.

263. Trial counsel also had the results of a psychological examination conducted to determine if Mr. Wood was competent to stand trial that indicated that Mr. Wood had trouble with anger control, anti-

social behavior, and that Mr. Wood functions in the "borderline intelligence" range. ® 239-246).

264. Although each piece of evidence alone likely would have warranted a complete psychological evaluation. Mr. Wood's special education placement, his poor academic performance, facial abnormality, family history of mental illness and mental retardation, together with the psychological report by Dr. Kirkland referencing Mr. Wood as functioning in the borderline intelligence range, clearly required expert assistance.

265. Mr. Wood should have been evaluated by an independent psychiatrist with experience in the area of mental retardation to determine his degree of mental retardation and the presence of mental illness. Based on the information from Mr. Wood's older sister that their mother drank alcohol throughout her pregnancies, defense counsel should have requested an examination by a neurologist to determine if Mr. Wood suffered from fetal alcohol syndrome. The neurologist would have also been able to determine if Mr. Wood suffered from organic brain damage.

266. Defense counsel's failure to request mental health expert assistance resulted in clear prejudice to Mr. Wood. A mental health expert would have been able to describe Mr. Wood's mental deficiencies and illnesses as well as the commutative effects of intelligence disabilities and mental illnesses with social histories such as Mr. Wood's. This type of evidence of limitations and difficulties, rooted at birth and in early childhood, is particularly likely to gain the sympathies of jurors. *See e.g., Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), *cert, denied* (1996) (explaining that jurors are more likely to be persuaded by evidence such as mental retardation).

267. A mental health expert would have interpreted Mr. Wood's symptoms of mental retardation and explained that persons with mental retardation have limited coping and adapting skills. An expert would also have testified to the relevance of mental retardation to Mr. Wood's culpability, including to the three statutorily defined mitigators: "(2) the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) the defendant acted under extreme duress or under the substantial domination of another person, and (6) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired." Section 13A-5-51 of the Alabama Code.

268. An expert would have assessed the likelihood and significance of in utero exposure to alcohol. An expert would have testified to the jury that fetal alcohol syndrome is the leading known cause of mental retardation and birth defects. She would have explained that fetal alcohol syndrome is manifested by postnatal growth deficiency, small brain size and facial anomalies. Mild to moderate mental retardation is common and many children born with fetal alcohol syndrome are later diagnosed with hyperactivity and other emotional and behavioral disorders. An expert would have also confirmed that drug-exposed infants require special education later or in life to address developmental, learning, emotional and behavioral problems resulting from their drug exposure in utero. An expert would have been able to inform the jury that Holly suffered all the symptoms attendant to fetal alcohol syndrome.

269. An expert would have also testified about the combined effects of Mr. Wood's mental retardation and/or low intelligence, history of abuse, poverty, and alcoholism. The expert would have explained how the sustained, severe abuse by care-takers that Holly suffered, coupled with Holly's intelligence disabilities and childhood trauma, could have had long-term damaging consequences. An expert would have interpreted the science to the jury, making a connection between Holly's abuse and mental disability to reveal how the intersection of these factors would lead to volatile behavior in adulthood. Specifically an expert would have testified that the degree of risk and severity of the violent behavior are exacerbated when the abused child, as an adult, has other psychological, neurological, and cognitive impairments. An expert would have explained that the presence of cognitive deficits in a person who was abused as a child creates a matrix for violence.

270. Furthermore, an expert would have explained how this combination of factors and mental illness may have damaged Mr. Wood's ability to perceive and respond to stressful situations without violence. The history of physical abuse and social factors in conjunction with intelligence disabilities lead to impaired judgment about how to respond to difficult situations, a decreased ability to think through and understand consequences, and a limited ability to control impulses. An expert would have testified that this nexus of alcoholism, intelligence disabilities, and history of physical abuse placed Mr. Wood at an increased risk for engaging in impulsive and aggressive behavior.

271. Presentation of this expert testimony would have provided a compelling explanation of the link

between Mr. Wood's childhood exposure trauma, violence. and poverty to the violent tendencies of Mr. Wood as an adult. Expert testimony could have persuaded the jury to consider that the defendant was less capable of controlling his actions, and therefore less culpable. Alternatively, the expert testimony would have provided the jurors with a clinical and moving explanation of the extraordinary violence to which Mr. Wood was exposed throughout his life, and almost certainly persuaded some jurors to feel more sympathetic to Mr. Wood and thereby vote for life.

272. By failing to request expert assistance to determine Mr. Wood's degree of mental retardation, possible existence of organic brain damage, and presence of mental illness, defense counsel failed to investigate critically important statutory and non-statutory mitigation. Defense counsel's failure to introduce mental health evidence at the penalty phase cannot be characterized as a strategic decision since defense counsel did not obtain expert assistance, and therefore did not meaningfully investigate mental health issues.

273. In light of counsel's penalty phase ineffectiveness, Mr. Wood's sentence of death should be vacated.

C. Counsel Made Prejudicial Errors in Challenging the State's Aggravators

274. Trial counsel failed to adequately investigate the state's case and therefore was unprepared at the mitigation phase. Defense counsel erred and allowed a prejudicial letter from the district attorney's office to be published to the jury without defense objection, (TR. 994), The letter stated the district attorney's opposition to Mr. Wood's release on parole at his prior conviction. *Id.* Trial counsel did not read the letter

before waiving its objection. (TR. 997). Trial counsel's failure to exclude the clearly prejudicial letter cannot be construed as a strategic decision since counsel did not know its contents.

275. The letter clearly should have been excluded under Alabama law. First, under Alabama rules of evidence the letter should have been excluded because the letter was irrelevant to any fact at issue. *See Gamble*, McElroy's Alabama Evidence § 21.01 (4th Ed. 1991) (explaining that under Alabama law evidence is admissible only if it is relevant and probative of a fact at issue in a case). The letter was not relevant to prove that Mr. Wood was convicted of a prior conviction, nor that Mr. Wood was on parole. The only significance of the letter was that it conveyed the prosecutor's opinion that Mr. Wood was a violent criminal who should not be released because of future dangerousness. Alabama law does not permit comments on future dangerousness. Ala Code § I 3A-5-49.

276. Defense counsel compounded their error by stressing the letter's significance in the mind of the jury with questions that established that the letter was not routine, and that it was fueled by the district attorney office's fear that Mr. Wood would commit another offence. (TR. 995-997).

277. By failing to object to damaging evidence that is clearly excludable, Mr. Wood's trial counsel failed their duty to provide Mr. Wood with reasonable representation at the sentencing phase. As a result of counsel's failure, the jurors considered an impermissible aggravator future dangerousness, in their deliberation about sentencing. The jury members may have concluded that the likelihood of Mr. Wood committing a future crime required a death sentence

because of counsel's failure to exclude the letter. Mr. Wood suffered prejudice as a result of counsel's failure to exclude non-statutory aggravators, and is due a new sentencing trial.

D. Trial Counsel Failed to Prevent or Otherwise Object to Egregious Instances of Prosecutorial Misconduct

278. Trial counsel failed to object to egregious prosecutorial misconduct during the penalty phase. Trial counsel did not object to the prosecution's violation of the strict Alabama statutory prohibition on commenting on future dangerousness. *See infra* part VI.B. Trial counsel did not object to the prosecution's use of a fable during closing argument. to argue that Mr. Wood posed a future danger. (IR. 1071). The jury should have been instructed to disregard the improper conduct. As a result of counsel's failure to object, the jury wits encouraged to consider future dangerousness in violation of the Alabama statutory prohibition and Mr. Wood's rights to due process, a fair trial and a reliable and individualized sentence. Mr. Wood was prejudiced by defense counsel's failure to object to clearly impermissible argument.

279. Defense counsel also failed to object to the prosecution's misstatement of the law on mitigation. The prosecution encouraged the jury to disregard mitigating factors in its closing of the penalty phase. *See infra* Part V. B. (TR. 1069). Defense counsel's failure to object allowed the jury to enter deliberations with one of two possible understandings: one, that the defendant was fabricating excuses, and two, that proving a mitigating factor carries a higher burden than proving an excuse. Either of these possibilities would have prejudiced the jury by making the

jury less likely to vote for life. Mr. Wood is therefore entitled to a new sentencing.

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A JURY INSTRUCTION ON THE ISSUE OF MENTAL RETARDATION, AND THIS INEFFECTIVENESS RESULTED IN THE UNJUST AND UNCONSTITUTIONAL IMPOSITION OF THE DEATH PENALTY

280. Prior to trial, counsel for Petitioner was aware that Mr. Wood had symptoms consistent with mental retardation. Indeed, the state's own psychiatrist, Dr. Karl Kirkland in his competency examination of Mr. Wood, stated that Mr. Wood functions "at most, in the borderline range of intellectual functioning". In addition, Mr. Wood's history of learning disability was well documented in medical and school records and was well known among his teachers and family who were willing to testify at trial. *See supra* III.A.5.

[5] KENNETH TROTTER

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HOWLEY:

Q. Please state your name.
A. Kenneth Trotter.
Q. What is your occupation?
A. I'm a lawyer.
Q. Where do you practice law?
A. Washington, D.C.
Q. Are you here today pursuant to a subpoena?
A. I am.
Q. What is the nature of your law practice? What type of law do you practice?
A. Civil litigation.
Q. Could you describe briefly your education after high school?
A. I attended Brigham Young University where I received a bachelor of arts, and English was my major. After that, I attended law school at Vanderbilt University and finished in 1993.
Q. When did you graduate from Brigham Young?
A. 1990.
Q. What bar or bars are you admitted to practice in?
A. [6] I'm a member of the Alabama Bar. I was admitted in 1993. I'm a member of the bar of the District of Columbia. I was admitted in 1996 there. I'm also a member of the Florida Bar. I was admitted to the Florida Bar in 2000.
Q. Do you recall when in 1993 you were admitted to the Alabama Bar?
A. I don't recall the specific date, but it would have been in the fall of 1993.

Q. Have you ever represented the petitioner Holly Wood?

A. I have.

Q. When did you represent him?

A. 1994.

Q. With respect to what matter?

A. With respect to a matter—a capital murder charge.

Q. How did you come to represent Mr. Wood?

A. As I recall, Judge Barr appointed me to represent him and assist two other attorneys on the matter.

Q. Did you ask to be appointed?

A. No, I did not.

Q. Were you the only lawyer appointed to Mr. Wood?

A. [7] No, I was not.

Q. Who else was appointed to Mr. Wood?

A. I know that Cary Dozier was one of the attorneys. As I recall at the time that I was appointed by Judge Barr, there was another attorney on the case. I can't recall the name of that attorney. Thereafter, that attorney had either recused himself or asked to be dismissed, and he was replaced by Frank Ralph.

Q. Does the name Allen Jones ring a bell?

A. It does.

Q. Is that the other lawyer?

A. As I recall, that would be the other lawyer.

Q. At the time you were appointed to represent Mr. Wood, did you know Mr. Dozier?

A. I did.

Q. Did you have any—well, how did you know Mr. Dozier?

A. I rented office space from Mr. Dozier here in Troy.

Q. Had you worked on any cases as co-counsel with him prior to your appointment to represent Mr. Wood?

A. No, I had not.

Q. Did you have any business relationship with him?

A. Other than renting—I rented office space from [8] him.

Q. Before today, have you discussed these proceedings with anyone representing The State?

A. I've discussed it briefly on a couple of occasions.

Q. Who did you discuss it with?

A. I cannot recall the names. A woman called last fall from the AG's office. I can't recall her name. And then this past winter, another attorney, a gentleman called from the AG's office. And I can't recall his name either

Q. Were both of your contacts over the phone?

A. Yes.

Q. Do you recall the substance of your conversation with the woman from The State?

A. She inquired as to, whether or not I would talk to her about Mr. Wood's case. I indicated to her that I had—that I would not at that time; I had concerns about attorney/client privilege and requested that she provide additional information. She indicated that the privilege had been waived based on, the filing of a Rule 32. I indicated to her that I had never seen a filed Rule 32 in this matter and that [9] if she wanted to speak with me at a bare minimum she would have to provide me with some indicia of the Rule 32 before I'd even consider talking to her about it.

Q. Did you have any further conversations with this woman?

A. No, I did not.

Q. Do you recall the substance of your conversation with the man who called you in the winter?

A. It was pretty much the same thing. Again, he called. They wanted to talk about Mr. Wood's case. I indicated that I had received a phone call in the fall from someone from the AG. I reconveyed to him my concern about breach of attorney/client communication and said that before I would talk with him further they'd have to provide some indicia that the Rule 32 had been filed at a bare minimum before I would consider talking to them further substantively about the case.

MR. HOWLEY: Your Honor, I'd like to ask the court reporter to mark as Plaintiff's Exhibit 3 a document that says on its face, Attorney's Fee Declaration, and appears to be dated January 4 of 1995. And, Your Honor, I have provided a copy for counsel for The State.

[10] (Petitioner's Exhibit Number 3 was marked for identification.)

MR. HOWLEY: May I show the exhibit to the witness?

THE COURT: You may.

Q. Mr. Trotter, please take a look at Exhibit 3. Does your signature appear on the first page?

A. That's my signature.

Q. And is that your signature on the last page?

A. That is my signature.

Q. Do you recognize this document?

A. Yes.

Q. What is it?

A. It's the fee declaration that I submitted in this case.

Q. Were you paid to represent Mr. Wood in the capital murder case?

A. Part of my time was paid for. Part of my time was not paid for.

Q. Do you see on the first page where it says total claim of attorney $3,433.89? Were you paid that amount?

A. As I recall, yes.

Q. Were you paid any other amounts for representing Mr. Wood?

A. [11] No, I was not.

Q. Does this Exhibit 3 accurately reflect the time that you spent working on Mr. Wood's case?

A. In part it does. What is here is accurate. This does not reflect all the time that I spent working on Mr. Wood's case.

Q. Why is that?

A. As I recall, there's a statutory cap on the number of hours that you can bill The State for out-of-court work. And I believe when I achieved the cap, I didn't continue to—I didn't submit bills for that time.

Q. When you were first appointed to represent Mr. Wood, did you and Mr. Dozier discuss any division of responsibility for the case between you and Mr. Dozier?

A. We did discuss the division of responsibility, but it wasn't between just me and Mr. Dozier. It was between Mr. Dozier, myself, and the third attorney.

Q. And that third attorney was Mr. Ralph?

A. At one point it was Mr. Jones, then it became Mr. Ralph.

Q. Well, let's begin with your discussions with Mr. Dozier and Mr. Jones. What did you understand was [12] your responsibility on the case at that point?

A. Well, I don't recall specifically how as between Mr. Jones and Mr. Ralph and Mr. Dozier, but the distinction was along the time. My understanding was that I was to assist the two senior attorneys because all three—Mr. Jones, Mr. Dozier, and Mr. Ralph—were considerably senior to me in their experience in the law. And my understanding was is that I was appointed by Judge Barr to assist them on this case.

Q. Did you have any understanding of what the nature of your assistance would be?

A. At one point in time, it seemed that Mr. Dozier made the determination that I would assist primarily with the penalty phase—preparation of the penalty phase.

Q. Do you recall when that occurred?

A. No, I do not.

Q. Do you recall whether it was at the beginning of your appointment?

A. I recall it was early on in my appointment.

Q. Did you have any understanding of what Mr. Dozier's responsibilities on the case were?

A. My understanding was that Mr. Dozier was sort of the principal attorney and he was to oversee [13] all phases of the trial, including both the penalty and the sentencing—the sentencing and the guilt or innocence adjudication. And he was to oversee all parts of the trial; that he specifically was focussing, however, his efforts on the initial phase, the determination of guilt or innocence; and that Mr. Ralph, as I recall, was to be more primarily responsible for the penalty phase.

Q. Did you ever go to the crime scene?

A. I did not.

Q At the time you were appointed to represent Mr. Wood, what was the nature of your law practice?

A. I had a general law practice.

Q. Can you describe the types of work you did in your general law practice?

A. Yes. I did juvenile court work, some criminal defense, small claims, commercial litigation involving breach of contract issues, some family law.

Q And how long had you been practicing law at the time you were appointed to represent Mr. Wood?

A. I graduated from Vanderbilt around May or April of '93, as I recall. I passed the bar in September or October, some time of that year, and began practicing in Troy and was appointed to represent Mr. Wood shortly thereafter. And I can't [14] recall if that was late '93 or early '94.

Q. Please take a look at Exhibit 3. And there's one box on the first page that says mark appropriate court. And under that box, there's a sentence that begins the undersigned attorney declares that—do you see the sentence?

A. Yes, I do.

Q. Does that refresh your recollection as to when you were appointed to represent Mr. Wood?

A. Yes, it does.

Q And when was that?

A. Based on this document, it would appear that I was appointed February 3rd of 1994.

Q. So you had been practicing law about five Months at that time?

A. I had been admitted to the bar about five months at that time.

Q. And how long had you been practicing law at that point?

A. I was not a member of any bar prior to that time and had not been practicing law as a lawyer. I had worked at some law firms and clerked for a judge

and been engaged in the legal process as a. clerk but not as a lawyer until October or so of '93.

Q. As of the time you were appointed. To [15] represent Mr. Wood, had you ever tried any jury cases to verdict?

A. Could you repeat the question?

Q. As of the time that you were appointed to represent Mr. Wood, had you tried any jury cases to verdict?

A. No, I had not.

Q. Had you tried any nonjury trials to verdict?

A. I can't recall the answer to that question. I handled some matters—some bench trial matters here in Pike County before a couple of the judges. And I can't recall if any of those had been tried to verdict prior to that time or not.

Q. Had you ever worked on a capital murder case?

A. I had not.

Q. As of the time that you were appointed to represent Mr. Wood, had you conducted any trials in criminal cases?

A. I can't recall the answer to that. I can't answer that completely because I can't recall. I represented, again, some juvenile court matters, and I don't know if you would consider the hearings that are held in that to be a trial or not, but I had done some of those. At what point I started doing them and at [16] what point I would have handled some of those to completion, I can't recall.

Q. Please take a look at Exhibit 3; and if you would, turn to the second page. There are entries on February 7th and February 8th, 1994. It reads, Research re: capital defense. Do you recall what type of research you were doing there?

A. I do not.

Q. Do you recall meeting with Mr. Wood at any time during your representation of him?

A. I do.

Q. What's your recollection of your first meeting with him?

A. As I recall, Mr. Dozier and I met with Mr. Wood in the Pike County Jail in the room that they have there for meeting with clients.

Q. How long was that meeting?

A. I can't recall.

Q. Take a look at Page 2 of Exhibit 3. You have an entry on February 23, 1994, meet with client at the jail. Is that the meeting you're referring to?

A. Based on the fee declaration, that appears to be the first entry where I note that we met with the client. I don't have an independent recollection. But based on this document, it would [17] appear that's the first time I met with Mr. Wood.

Q. Does the time entry there refresh your recollection as to how long you met with Mr. Wood?

A. It does not. It reflects two hours, but I don't recall.

Q. Do you recall whether you accurately recorded the amount of time you spent on particular matters on this document?

A. Yes, I do. It's my practice to record accurately the information.

Q. If you look at Page 3 under the heading Expenses, in February, you have two entries that say four miles; Do you recall what those four miles refer to?

A. I believe that's the distance from where my office was located to the courthouse. I should say to come and go. I believe it's two miles each way.

Q. Do you know someone named Pete Taylor?

A. I believe Pete Taylor is the private investigator on this matter—was the private investigator on this matter.

Q. During your representation of Mr. Wood, did you meet with Mr. Taylor?

A. I did meet with Mr. Taylor, but Mr. Dozier was the primary contact for Mr. Taylor.

Q. [18] Do you recall reviewing any written work that Mr. Taylor did?

A. I recall Mr. Taylor was the private investigator; that he would have prepared reports; and that I would have reviewed those. But I don't recall any specifics about what I reviewed.

Q. Did you have any role in deciding what Mr. Taylor would investigate?

A. No. Mr. Dozier was the primary point of contact for Mr. Taylor, and he was the one that determined what would be investigated.

Q. Did you have any discussions with Mr. Dozier about what Mr. Taylor should investigate?

A. Again, Mr. Dozier took the primary lead with Mr. Taylor. If I discussed that with Mr. Dozier, I don't recall.

Q. Do you remember a Dr. Kirkland?

A. I do not.

Q. Please take a look at Page 2 of Exhibit 3, under the out-of-court category, the date entry is 5/10/94, conversation with Dr. Kirkland. Does that .5 refer to half an hour?

A. It does.

Q. Does this refresh your recollection as to who Dr. Kirkland is?

A. [19] This entry alone does not refresh my recollection. The best I can recall is that perhaps Dr. Kirkland is the doctor who evaluated Mr. Wood, but I don't recall very clearly.

MR. HOWLEY: Your Honor, I'm going to ask the court reporter to mark as Exhibit 4 for identification a document. It appears to be on the stationery of Kirkland, King, & Renfro. And I'm providing counsel for The State with a copy.

(Petitioner's Exhibit Number 4 was marked for identification.)

Q. Mr. Trotter, please take a look at what's been marked as Exhibit 4. Take your time if you want to look through that document. When you have, please tell me if you recognize it.

A. I don't recall this document.

Q. Does this refresh your recollection at all as to who Dr. Kirkland is?

A. I don't have an independent recollection. I can look at the document and see that I'm mentioned in the document and, you know, by looking at the date of report 5/13/94. I mean, I can only speak as to what the document says, but I don't have any independent recollection of this.

Q. Do you recall reviewing a report from a [20] psychologist who evaluated Mr. Wood?

A. May I look at my Exhibit 3?

Q. Feel free to.

A. I don't have an independent recollection. Some of these entries look like they might indicate that I reviewed the report.

Q. Do you recall that there was a report from a psychologist who evaluated Mr. Wood?

A. I do recall that Mr. Wood was evaluated; and that, you know, that a report was prepared based on the evaluation.

Q. Do you have any understanding of who among the lawyers representing Mr. Wood, if anyone, was responsible for reviewing that report?

A. I recall initially Mr. Dozier would have probably reviewed this report. It seems that most of the correspondence went to Mr. Dozier. He was the primary point of contact. And if Cary Dozier thought that was something that I should review or have, then he would give me a copy for me to review as well.

Q. Sitting here today, do you have any recollection of Mr. Dozier giving the report of the psychologist to review?

A. I recall Mr. Dozier mentioning a report, and I don't recall any more about the conversation other [21] than the fact that a report had been received and that he had looked at it.

Q. Do you know someone named Susan Wood?

A. I can't recall. It may have been one of Mr. Wood's sisters. I'm not sure.

Q. Please take a look at Exhibit 3, your fee declaration. On Page 2, there's an entry dated 6/28/94, call to Susan Wood re: Holly, half an hour. Does that refresh your recollection as to who Susan Wood is?

A. No. Other than the fact that she must have had some connection based on the name and based on the fact that she's listed on this report that I contacted her. But I can't recall if she was a sister or an aunt or a cousin. But there must have been some connection because I had called her in connection with this case and based on the last name.

Q. Do you recall why you called her?

A. No, I do not.

Q Do you recall anything of the substance of your conversation with her?

A. No, I do not.

Q You have an entry here on 6/28/94, call to Luverne High, 2. Do you remember calling Luverne High?

A. [22] I recall in preparation for the penalty phase trying to contact people at the schools where Holly had attended to sort of elicit some sort of information from them about Holly.

Q. What type of information were you looking for?

A. Background information about what kind of student he was, what kind of person he'd been at the school, you know, anything that would be able to be used as a mitigating factor—a mitigating circumstance for preparation of the penalty phase.

Q. Did you, in fact, speak to anyone at Luverne High?

A. I did speak to people at Luverne High, as I recall. Or I should say I spoke to people in general about Holly's education when I was trying to call.

Q. Who did you speak to?

A. I don't recall.

Q. Do you recall what positions they held at Luverne High?

A. No, I do not.

Q. Do you recall speaking to any teachers?

A. No, I do not.

Q. Did you obtain any academic records from Luverne High?

A. [23] No, I did not obtain any academic records from Luverne High. And, in fact, part of the calls I believe may have been trying to obtain those academic records. And as I recall, we ultimately issued a subpoena to the schools perhaps trying to get those records because the people that I contacted at the schools were not cooperative in assisting with the preparation of Mr. Wood's background information.

Q. Why do you say they were not cooperative?

A. As I recall—I mean, just looking at the length of the conversations, I was calling trying to get information about what kind of student Holly had been, anything that might be helpful to the defense. And they wouldn't talk to us about the case, so we issued a subpoena, as I recall, trying to get more information. And they didn't respond to the subpoena.

Q. Did you talk to Mr. Wood about who his teachers were?

A. I can't recall.

Q. How many times did you call Luverne High?

A. I can't recall. I can go through the bill if you like. I can look at the entries that I have listed here, but' I'm not sure that that would reflect all the calls because I didn't bill all the time that I spent on the case. It's not all recorded here.

Q. [24] Did you record all your time up to the last entry here that's 9/2/94 under the out-of-court section?

A. I can't recall. What I think I did was—when I prepared this fee declaration, I think that I went sequentially through my bill up until the point I had achieved the fee cap for the out of court hours. And then I stopped.

MR. HOWLEY: Your Honor, I'd like to move into evidence Exhibit 3, which is the time records.

MR. HOUTS: No objection, Your Honor.

THE COURT: Admitted.

MR. HOWLEY: I'd like to ask the court reporter to mark for identification as Exhibit 5 the document that has on the top Subpoena Request Form. And I'm giving a copy to counsel for The State.

(Petitioner's Exhibit Number 5 was marked for identification.)

Q. Mr. Trotter, please take a look at Exhibit 5. Feel free to look at the whole thing. But my first question to you is whether that's your signature on the first page at the bottom?

A. That's my signature on the first page.

Q. Can you tell me what this document is?

A. It's a subpoena request form.

Q [25] And how about the pages that follow?

A. They're subpoenas.

Q. Did you prepare each of these documents?

A. I can't recall, but it would appear to be yes.

Q. Please take a look at Exhibit 3. On the second page, you've got a couple of entries on 6/28/94, call to Cary re: subpoenas, call to attorney re: subpoenas and subpoena duces tecum. Does that refresh your recollection whether you prepared the subpoena request form and subpoenas that are marked as Exhibit 5?

A. Again, based on the information that's here, it appears that I did. But I don't have an independent recollection of having done that.

Q. Did you prepare any subpoenas other than the ones that are part of Exhibit 5?

A. I can't recall.

Q. Who was the attorney that you called re: subpoenas?

A. Mr. Dozier.

Q. Do your fee declaration entries reflect two calls to Mr. Dozier?

A. I'm not sure if it's two calls to Mr. Dozier. 6/28/94 indicates that I called Mr. Dozier [26] about the subpoenas. And there's another call that same day to an attorney about the subpoenas. I don't know if that was Mr. Dozier or Mr. Ralph or someone else.

Q. Were you still sharing office space with Mr. Dozier at this point?

A. I don't believe so.

Q. When did you stop sharing office space with him?

A. I can't recall a precise time period, but it would have been in: the spring of '94.

Q. And why did you stop sharing office space with Mr. Dozier?

A. I wanted to move to Montgomery.

Q. Please take a look at the expenses entries, which are Page 3 of Exhibit 3. And do you see that entries for long distance phone calls begin on 6/28/94?

A. That's what it states on the expense declaration.

Q. Does that refresh your recollection at all as to when you moved to Montgomery?

A. It's consistent with my recollection that it was along the—I guess if summer starts June 21st, then it would have been late spring perhaps when I [27] moved to Montgomery.

Q. By the time you moved to Montgomery, had your responsibilities on the case changed at all from when you first started working on Mr. Wood's case?

A. My understanding of my responsibilities had not changed.

Q. Did there come any point in time during your representation of Mr. Wood that your responsibilities on the case did change?

A. Yes. Shortly before the trial.

Q. And how did your responsibilities change at that point?

A. My understanding throughout the course of my representation up until the time shortly before the trial was that I was there to assist Mr. Dozier and Mr. Ralph and that they would be sort of the

principal spokespersons for Holly in the courtroom. And my understanding, I believe, was that Mr. Ralph was going to conduct the penalty phase of the trial and that Mr. Dozier was going to conduct the first phase of the trial or the first phase of the proceeding. And shortly before the trial, a decision was made, not by me, that I would represent Mr. Wood during the penalty phase in the courtroom.

Q. How much before the trial was that decision [28] made?

A. I cannot recall.

Q. Who made that decision?

A. It wasn't me. It would have had to have been Mr. Dozier or Mr. Ralph, either alone or in conjunction. I can't recall who told me I was going to do it.

Q. How did you learn of the decision?

A. I was told, Ken, you're going to have to handle this part of the trial.

Q. Did you have any discussion with Mr. Dozier or Mr. Ralph about that decision?

A. My understanding was is that they perceived that since I had been doing the background work for them that I would have an understanding of the information and that I would handle that; that way they could focus on the first phase of the litigation.

Q. Did you object to handling the penalty phase of the trial?

A. I objected at a couple of points to handling the penalty phase of the trial. I wasn't—I didn't think that we were actually prepared to move forward with the penalty phase of the trial when we moved forward with the penalty phase. But I'll say that after consultation with Mr. Dozier and Mr. Ralph that [29] their concerns about that were alleviated. And at their direction, I went ahead and proceeded.

Q. Please take a look at Exhibit 3, the third page. That's still in the category of out-of-court time. For August 8th and August 9th, you have a number of entries preparing motions. Does that list reflect all the motions that you prepared?

A. I don't know.

Q Well, looking at this list, can you think of any motions that you prepared that are not on this list?

A. I can't think of any.

Q. What did you understand your role was with respect to preparing motions?

A. Initially I didn't understand that I was going to be preparing any motions. At some point in the summer of '94, in consultation with Mr. Dozier, I contacted the Southern Poverty Law Center—I believe is the name of the organization—and obtained some information from them regarding the preparation for the trial. And based on the information I obtained from them, I determined to discuss with Mr. Dozier the filing of these motions. And then I handled it. Since I was in Montgomery, I'm the one that actually prepared the motions and submitted them.

Q. [30] Who determined which motions to prepare?

A. As I recall, I talked to. Mr. Dozier. And I talked to also a gentleman at the Southern Poverty Law Center, and I don't recall who that was.

Q. Did you make the ultimate decision on which motions to prepare?

A. I had a contribution. I don't know if you could say I was the ultimate decision maker on that.

Q. Was there anyone who made the ultimate decision?

A. I can't recall. I think it would have been Mr. Dozier. I mean, it seems that there was a consensus that the motions would be filed, and I filed them. I

don't recall the discussions being more extensively about it than that.

Q. Please take a look again at Page 3 of Exhibit 3. You have on September 1, 1994, preparation for motion hearing eight hours. What did you do during those eight hours?

A. Well, I had reviewed all the motions. As I recall, we had the motion hearing in this room. And I wanted to be prepared to argue the motions, if necessary, or to respond. And I would have been reviewing the motions, perhaps reviewing case law, getting things in order for the hearing.

[31] (There was a brief interruption in the hearing.)

(A short recess was had in the proceeding.)

Q. (Mr. Howley) Did you anticipate that you would be arguing the motions?

A. I can't recall. I note that I discussed—from the dates on the bill, I discussed this with Mr. Ralph and Mr. Dozier. I can't recall if that was their suggestion that I would handle the motion hearing or what.

Q. Do you recall whether you did argue the motions?

A. I did.

Q. And do you recall when you learned that you would argue the motions?

A. No, I do not.

MR. HOWLEY: Your Honor, we move. Exhibit 5, the subpoena request form and subpoenas, in evidence.

MR. HOUTS: No objection, Your Honor.

THE COURT: Admitted.

MR. HOWLEY: I'd like to ask the court reporter to mark as Exhibit 6 a letter on the stationery of

Kenneth B. Trotter, attorney at law, dated November 3, 1994. I'm providing The State's counsel with a copy.

[32] (Petitioner's Exhibit Number 6 was marked for identification.)

Q. Mr. Trotter, please take a look at Exhibit 6. And let me know if that's your signature above your name.

A. That's my signature.

Q. Is this a letter you wrote to Mr. Frank Ralph on or about October 3, 1994?

A. It appears—yes, based on the document.

Q. Why did you write a letter?

A. I don't recall specifically.

Q. Did you call Mr. Ralph about the matters you note in your letter here?

A. The fee declaration stops at the beginning of September. I don't recall specifically, but—I don't remember.

Q. Is there any reason why you would have written instead of called Mr. Ralph at this point?

A. Well, I might have done both. I might have called and written him, but I don't have a recollection of the call. But obviously we have the letter, so I can recall the letter.

Q. Did you get a response from Mr. Ralph to this letter?

A. I can't recall. It seems consistent with my [33] recollection that Mr. Ralph was handling the penalty phase of the trial. And I was trying to do background work for it. And I was alerting him to things that I didn't think were necessarily ready for the penalty phase and asking if he needed additional help or if I should do anything else about it.

Q. Were you assisting in the preparation for trial at this point?

A. Again, my energies were focussed on preparation for the penalty phase, doing background work, research. I think that this letter reflects that, you know, I haven't received material from these people. It appears that it was something that would have been helpful to the preparation for the penalty phase. And I was alerting Mr. Ralph to the fact, you know, that this was an issue that we needed to discuss, or address, and offering my assistance to move the matter forward if we could.

Q. Did you ever receive the records requested from the Alabama Department of Corrections that you refer to here?

A. I can't recall.

Q. Did you ever receive the parole board records that are referred to here?

A. I can't recall.

Q. [34] What are you referring to when you write here DHR?

A. I can't recall. It might have been Department of Human Resources or—I don't know.

Q. Do you recall whether you ever received the DHR records that you were looking for here?

A. I can't recall.

Q. Did you ever do anything to follow up on this letter?

A. I can't recall.

Q. During the trial of this action, in the guilt innocence phase, did you commute back and forth between Montgomery and here?

A. I did.

MR. HOWLEY: I'd like to move into evidence, Your Honor, Exhibit 6.

MR. HOUTS: No objection.

THE COURT: Admitted.

MR. HOWLEY: And I'd like to mark as Exhibit 7 a one page document oh stationery of Cervera and Ralph. It has the date October 26, 1994. And I'm giving a copy to The State's counsel.

(Petitioner's Exhibit Number 7 was marked for identification.)

(A short recess was had in the proceeding.)

Q. [35] (Mr. Howley) Mr. Trotter, please take a look at Exhibit 3, your fee declaration, the third page, the last entry on out of court just above expenses. The last entry is September 2, 1994. At that point, did you know that you would be responsible for conducting the trial of the penalty phase?

A. I don't believe so.

Q. Do you recall how long after September 2, 1994 it was that you learned you would be conducting the trial of the penalty phase?

MR. HOUTS: Objection. I believe the witness answered that he didn't know for sure whether or not by then he knew. He guessed.

THE COURT: Sustained.

Q. What did you do after September 2, 1994, to prepare for the trial of the penalty phase?

A. I can't recall specifically as to dates and times and specific projects. But since I was involved in the penalty phase, I know I would have been involved in trying to gather all the information that we'd obtained into a format that Mr. Ralph could use when he went into court.

Q. Who did you speak to to prepare for the trial of the penalty phase?

A. Well, I would have talked to Mr. Dozier and [36] to Mr. Ralph. I can't recall on what occasions or

if it would have been in person or by phone. But that's who I would have spoken to if I spoke to anybody about it. And based on this letter, Exhibit 6, of October 3, '94, it appears that I was using Mr. Ralph as the contact for that stuff at that point in time anyway.

Q. Did you speak to any potential witnesses for the penalty phase?

A. I did.

Q Who did you speak to?

A. I talked to a lot of Holly's family. I can't recall the ones that I spoke with. But we actually met here at the courthouse. And I spoke to a lot of the family members, and I don't recall again specifically which ones of the family I spoke with. But based on that is how I identified the witnesses that we used at the penalty phase.

Q. Do you recall any of the names of any of the family members that you spoke to?

A. I don't want to do injustice to their names, so I don't recall. I could make them up, but I don't think they would approximate exactly what they were.

Q. And when was this meeting at the courthouse?

A. I can't recall when we would have been at the courthouse. I know that there were a number of [37] occasions that Holly would be brought to the courthouse and his family would be here. And on some of those occasions at some point in time, I interviewed the family. We all met in one of the rooms here. I met with them in one of the rooms here at the courthouse.

Q. This meeting in one the rooms, did that only happen once?

A. I can't recall.

Q Do you recall multiple meetings?

A. I can't recall how many meetings there were.

Q What did you ask Holly's family members?

A. Just trying to get information about Holly's upbringing, his background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything that we could use to humanize Holly to make him seem more real to the jury; something that would make him seem more like a human being, somebody that would be worth saving even if that would mean he would spend his life in prison, something that would humanize him to the jury so that they would have a reason to give him life in prison as opposed to the death penalty.

Q Do you remember any specific questions you asked them?

A. [38] I do recall, just because it was sort of bizarre, that there was—there was a discussion, for example, about a car accident and Holly having lost his brother. And we discussed the trauma that that had or may have had on Holly, how it affected him. We talked about the family living conditions and circumstances. And I tried to get as much information as possible about his background from the family.

Q. Please take a look at Exhibit 7, which I think you have up there. It's the October 26th, 1994 letter. Is this a letter you received from Mr. Ralph on or about October 26, 1994?

A. I don't recall receiving the letter, but it appears to be a letter that Mr. Ralph sent me. But I don't recall receiving the letter.

Q. Now, at this point, was the trial of the penalty phase before the jury over?

A. Looking at the fee declaration—I don't have an independent recollection of the dates. But looking at my fee declaration, it appears that the trial occurred

the week of October 17th, '94, and so —October 17th through October 21st, and this appears that—Exhibit 7 appears to have been written maybe the following week sometime.

Q. Did you, in fact, handle the penalty phase [39] of the case in chief?

A. I was the spokesperson in the courtroom for the penalty phase, and I did a lot of the background research and material for the penalty phase.

Q. Did Mr. Ralph call you to tell you what he says in this letter?

A. I can't recall. I do recall it was unusual to receive a letter. I mean, I can't say that I have an independent recollection of receiving the letter. But I don't recall generally receiving correspondence from Mr. Ralph about something like this.

Q. Did you do anything in response to this letter?

A. I would imagine I prepared for the December 2nd hearing as referenced in the letter.

Q. Do you have any recollection of calling Mr. Ralph?

A. I don't have any recollection about any specifics related to the contents of this letter other than the fact that a hearing would have occurred. And based on this letter, it appears that I presented this information at the hearing.

Q. Did you receive the order that he refers to in the first sentence?

A. I can't recall receiving the order. But [40] this letter seems to typify sort of the general dynamics of the working relationship between Mr. Dozier, Mr. Ralph, and I in that they sort of made the decisions and told me what I was going to do. And here they're suggesting that I prepare for the December 2nd hearing. And so at their suggestion, I would have prepared for the hearing.

Q. Did you have any objection to preparing for the hearing?

A. I think objection might not be the right word to use. But as Exhibit 6 indicates, when I had questions about something if it wasn't sort of falling—if I had questions or concerns, I would try to raise it with them. And I don't know if you can say it was an objection. But if I had issues or concerns, I tried to raise it with them as to why I thought we were or were not prepared for something so they could give me feedback and guidance on how to proceed from that point.

Q. Prior to receiving this letter, did you anticipate that you would handle the argument of mitigating and aggravating circumstances?

A. Are you referring to Exhibit 7?

Q. Yes, Exhibit 7.

A. And are you referring to arguing at the [41] December 2nd hearing date?

Q. Yes.

A. Before receiving this letter, no, I would not have known that I was going to be doing that.

Q. Did you have any expectation before receiving this letter of who would handle the argument on December 2nd?

A. No, not that I recall.

MR. HOWLEY: I'd like to move Exhibit 7 into evidence.

MR. HOUTS: No objection.

THE COURT: Admitted. May I have a moment to just review that?

MR. HOWLEY: Yes, sir.

Q. Did you ask Mr. Dozier and Mr. Ralph for any assistance in preparing for the hearing on December 2nd?

A. I can't recall the preparation that was done for the hearing on December 2nd.

MR. HOWLEY: I'd like to mark as Exhibit 8 a letter on the stationery of Kenneth B. Trotter. And it has a date on it November 23, 1994. And I'm providing The State's counsel with a copy.

(Petitioner's Exhibit Number 8 was marked for identification.)

Q. [42] Mr. Trotter, please take a look at Exhibit 8. And once you've had a chance to look at it, let me know if that's your signature above your name.

A. That's my signature.

Q. Is this a letter that you sent to Mr. Dozier on or about November 23, 1994?

A. I don't have an independent recollection of this letter, but it appears to be. It's on my letterhead, and it's my signature. Yes, it would have been a letter I would have sent.

Q. You refer to a letter that. Frank Ralph sent you in the first sentence here. Is that the October 26th letter that we've marked as Exhibit 7 that you're referring to?

A. I can't recall, but it would appear to be so.

Q. Do you recall having any communication with Mr. Dozier or Mr. Ralph between the October 26th letter you got from Mr. Ralph and this one on November 23?

A. I can't recall.

Q Did you call them during that time period?

A. I don't remember.

Q. Did they call you?

A. I can't remember.

Q. [43] Why did you send this letter?

A. I think that the letter indicates that I had a concern about some of the information that was introduced at trial by the prosecution, and I thought it might have implications for the December 2nd hearing that we would want to explore further.

Q. Why did you communicate that to Mr. Dozier in a letter?

A. I rented office space from Mr. Dozier early on in the proceedings up until the spring of '94, or whatever it was in '94 when I moved offices. Much of our stuff wasn't in writing up to that point because it was just communicated in person. Thereafter, I think I began to write more in writing. If it was not something we discussed here at the courthouse, I would put it in writing to the extent I could. I was a one-person staff, so often I tried to do as much verbal as I could, but sometimes I'd put it in writing.

Q. What help did you want them to give you?

A. Since I was a young attorney and—I mean, I was able to see issues but relied a lot on them for guidance as to how to resolve the issues. And the issue here to me seemed to be the introduction of new evidence at the trial and the need to be able to [44] respond to that in time for the December 2nd hearing. And I was hoping that they would provide some guidance on how to handle that.

Q. Did you ask them specifically for any type of help?

A. Again, my only recollection is based on this letter. I don't have any independent recollection. But it appears that I provided my phone number and my home number and asked them to talk to me about preparing for the hearing.

Q. Did Mr. Dozier call you in response to this letter?

A. I can't recall.

Q. Did Mr. Ralph call you?

A. I can't recall.

Q. In the second paragraph of this letter, second sentence, you write, We have not had any independent psychological evaluation done since you said it would not be needed. What are you referring to there?

A. I recall that when we received—or on or about the time that we would have been having discussions with Mr. Kirkland, who was the person who evaluated Holly previously, there may have been a discussion about whether we should do anything further [45] and that Mr. Dozier had indicated that he had looked at the report and that he didn't think anything in the report really merited—that there was nothing in the report that merited going further. And so at that point, he determined that we didn't need any further evaluators and no further were called because in the course of my preparation for the penalty phase, I would read things about different psychological evaluations and had raised that to him. And, again, he looked at the report and thought that wouldn't be needed.

Q. Do you recall when you had this conversation with Mr. Dozier?

A. The conversation about the report?

Q. About not needing another psychologist.

A. It was sometime prior to the penalty phase, prior to October of '94. And I would imagine that it would have been around the time that we had received Mr. Kirkland's report and sometime thereafter.

Q. Was anyone else present when you had this conversation with Mr. Dozier?

A. I can't recall. But I need to add there given the nature of attorney/client communication, it would have been me, Mr. Dozier, someone on his staff, or Mr. Ralph, no one else. There would not have been [46] a third party present when we discussed it.

MR. HOWLEY: I'd like to ask the court reporter to mark as Exhibit 9 a one-page document that says Kenneth B. Trotter at the top. It has the date November 23, 1994. And I'm providing The State's counsel with a copy.

(Petitioner's Exhibit Number 9 was marked for identification.)

Q. Mr. Trotter, please take a look at Exhibit 9. And when you've had a chance to do that, let me know if that's your signature above your name.

A. It's my signature.

Q. Do you recall ever getting a response to this letter?

A. I don't recall.

MR. HOWLEY: Your Honor, I move Exhibit 8 and Exhibit 9 into evidence.

MR. HOUTS: No objection from The State.

THE COURT: They're admitted.

Q. Did you ever get a response from Mr. Dozier about your suggestion that you request an independent psychological evaluation of Mr. Wood?

A. My request in Exhibit 9?

Q. Yes.

A. Or Exhibit 8?

Q. [47] Exhibit 8 I think is Dozier, yes.

A. I can't recall.

Q. Did you ever get a response from Mr. Ralph to your suggestion that you request an independent psychological evaluation?

A. I can't recall.

Q. Did you ever make a request for an independent psychological evaluation?

A. I don't recall there ever being an independent psychological evaluation, and I can't recall that request was ever made. I would think that since there was no evaluation done, no request was made.

Q. Did you ever get a response to your suggestion that you ask for a postponement of the sentencing hearing?

A. I can't recall if it was at the penalty phase in October or if it was prior to the December 2nd hearing, but I recall raising with either Mr. Dozier or with Mr. Ralph that we hadn't received certain information or that there was additional preparation that I thought would behoove our preparation for Mr. Wood. And the response and I don't know who it was, but the response was that the judge would never grant a continuance or they didn't [48] think The Judge would grant a continuance. And we had to be prepared to move forward on that date.

Q. Was a request for a continuance made?

A. No request was made that I can recall.

Q. At the time you were representing Mr. Wood, did you have an understanding of what mental retardation is?

A. I'm not sure I understand the question.

Q. Well, sitting here today, do you have an understanding of what mental retardation is?

A. Just in general terms that it's perhaps based on low IQ quotient that demonstrates some sort of low mental capacity. But other than that, no.

Q. And is that what your understanding was at the time you were working on Mr. Wood's case?

A. I don't know what my understanding was at that time. It would seem that it would be consistent with my understanding today.

Q. Did you have any understanding at the time you were representing Mr. Wood of what the causes of mental retardation were?

A. No, I don't recall considering that.

Q. Did you have any understanding of what the indications of mental retardation are?

A. I don't recall one way or the other what I [49] understood at that time on that topic.

Q. At the time you were representing Mr. Wood, did you have any understanding of what fetal alcohol syndrome is?

A. I don't recall at the time of my representing Mr. Wood one way or the other what my understanding was.

Q. Do you know what the causes of fetal alcohol syndrome are?

A. I do not. Today—I cannot tell you that today.

Q. Do you know what the symptoms or indications of fetal alcohol syndrome are?

A. I can't tell you that today.

Q. Have you ever heard the term "fetal alcohol effects"?

A. I'm familiar with the fetal alcohol syndrome, but I don't specifically know what you're referring to by fetal alcohol effects.

Q. Do you have any understanding of alcohol related neurodevelopmental disorder?

A. I'm familiar with the general effects that alcohol can have on the system, but I'm not specifically familiar with that term.

Q. Do you have any understanding of a [50] relationship, if any, between fetal alcohol syndrome and mental retardation?

A. Today I do not.

Q. At the time of Mr. Wood's proceedings, did you?

A. I don't recall considering that.

Q At the time of your representation of Mr. Wood, did you have an understanding of what a mental disorder is?

A. I'm not a psychiatrist or a psychologist. I can have a layperson's understanding of a mental disorder, but I don't have anything beyond what a layperson or the average person would have of that term.

Q. What was your layperson's understanding?

A. A mental disorder?

Q. Yes.

A. Mental disorder to me can constitute a number of things from schizophrenia to depression. I'm not sure what you're referring to.

Q. Did you have an understanding at the time of what a mental disturbance is?

A. Again, I have an understanding in my mind of what a mental disturbance is, but I'm not a psychiatrist or psychologist. But, again, mental [51] disturbance can mean being upset at your wife to being upset with your children to having some sort of neurosis. I don't have anything more particular than that in mind.

Q. At the time you represented Mr. Wood, did you have any understanding of what grade level you would have to read at in order to understand a waiver of rights form?

A. I don't recall considering that.

Q. At the time you were representing Mr. Wood, did you have any understanding of what borderline range of intellectual functioning meant?

A. I don't recall considering that. I don't recall anything about that actually.

Q. Sitting here today, do you have any understanding of what borderline range of intellectual functioning means?

A. Other than it would seem that somebody who's operating on the border—a marginal intelligence level that might make their functioning in society or independently difficult.

Q. How would you describe the relationship between Mr. Wood and his attorneys during your representation of him?

A. It was more or less what you see here today; [52] that Mr. Wood was more or less a passive participant in the process; that he would attend the meetings and we would try to get information from him, but that it was—you know, it was difficult in the circumstances meeting at the jail in one of the rooms of the jail to build what one would call a rapport. So from what I recall, Mr. Dozier or myself would go in and try to get information from Mr. Wood in sort of a cold sterile climate. It was somewhat clinical. But I think we did the best we could under the circumstances at the jailhouse.

Q. At the time you represented Mr. Wood, did you have an understanding of what depression is?

A. I don't recall considering this. I relied upon Mr. Dozier's opinion of the psychiatry evaluation and upon the opinion of the psychiatric evaluator as to Mr. Wood's mental condition and state and that type of thing. I didn't conduct my own personal evaluation.

Q. I'm just asking if at the time you understood what depression was?

MR. HOUTS: Judge, at this point, The State is going to object unless the petitioner can show a specific claim in the petition which involves depression. I mean, there is a mental retardation [53] claim, but I do not believe there is a depression claim.

MR. HOWLEY: Depression, Your Honor, is one of the results of mental retardation.

MR. HOUTS: I don't think that's been established, Your Honor.

THE COURT: Overruled.

Q What was your understanding at the time of what depression is?

A. I don't recall what my understanding at the time was of depression.

MR. HOWLEY: I'd like to mark as Exhibit 10 two pages. The first page it says motion to withdraw, second page says order. I'm providing The State's counsel with a copy.

(Petitioner's Exhibit Number 10 was marked for identification.)

Q. Mr. Trotter, please take a look at Exhibit 10. Let me know if your signature appears on the first page, which is entitled motion to withdraw.

A. Yes, that's my signature.

Q. What are these two pages?

A. One is my motion to withdraw and the second one appears to be Judge Barr's order granting my motion to withdraw.

Q. [54] And why did you withdraw as Mr. Wood's counsel?

A. It states here that I was moving out of the state and closing my law practice.

Q. And did you, in fact, close your law practice at about this time?

A. Yes. I was in the process at this time of trying to wrap up all my obligations to various clients and preparing to move out of the state.

MR. HOWLEY: Your Honor, we move Exhibit 10 into evidence.

MR. HOUTS: No objection.

THE COURT: Admitted.

MR. HOWLEY: I'd like to mark as Exhibit 11 one page on the letterhead of Kenneth B. Trotter. It has the date August 16, 1994. And I'm providing The State's counsel with a copy.

(Petitioner's Exhibit Number 11 was marked for identification.)

Q. Mr. Trotter, please take a look at Exhibit 11. And once you've done so, please let me know if that's your signature above your name.

A. That's my signature.

Q. Is Kevin Doyle the individual at the Southern Poverty Law Center who you were in touch [55] with?

A. I can't recall, but it would appear to be so.

Q. Were you feeling stress during the time you were representing Mr. Wood?

A. There was a period of time when I did feel stressed, and this letter would have been written during that period of time.

Q. Was there a period of time when you were not getting the help and cooperation you expected from your co-counsel?

A. I would say this was a period of time where the situation wasn't as I had understood it to be. That my understanding was that I was to be an assistant to Mr. Dozier and to Mr. Ralph or Mr.

Jones. And at a certain point, I felt like that situation was unclear and that I was carrying a large burden. But I don't know that that's the case was certainly the way I felt at the time I wrote this letter. And I had tried to get some help from Mr. Doyle. I'm not sure he's with the Southern Poverty Law Center or the Alabama Capital Punishment Center.

Q. Well, what were you referring to when you refer here that you don't have anyone with whom to discuss the case including the two other attorneys?

A. [56] I seem to recall—I don't recall exactly what was going on at the time. But I recall that I don't know if they were busy or what was going on, but it was difficult at that time; that I was doing a lot of the preparation in the summer of '94; that I felt like I was working a lot of it independently and trying to call as much as I could to Mr. Ralph and Mr. Dozier to get their feedback on stuff. But to a certain extent, I was having to do a lot of work independently, more so than I thought when I initially accepted the appointment from Judge Barr.

Q. Is anyone paying for your travel expense to come here and testify today?

A. Yes.

Q. And who is that?

A. Kaye Scholer—the law firm Kaye Scholer, they paid for my plane ticket.

Q. Other than reimbursement of expenses, are you being paid in any way to come here and testify?

A. No.

MR. HOWLEY: I have no more questions for Mr. Trotter.

THE COURT: Cross-examination?

CROSS EXAMINATION

BY MR. HOUTS:

Q. [57] Good morning, Mr. Trotter. My name is James Houts. I'm with the Alabama Attorney General's office. I also have a tendency to speak too fast when I'm in court like this. So if I speak too fast, please tell me to slow down or repeat the question, and I'll be more than happy to.

You spoke of an attorney that was on the case when you were originally appointed named Mr. Jones?

A. That is correct.

Q. Do you recall why he withdraw?

A. No, I do not

Q So you don't know whether or not Mr. Holly Wood asked that Mr. Jones be removed and filed a motion to that effect?

A. Excuse me?

Q. Do you remember or recall whether or not Mr. Holly Wood filed a motion with The Court asking him for Mr. Jones removal?

A. No, I do not.

Q. You spoke about talking on the phone with our office. I believe you talked to Ms. Anderson. I believe you also talked—I think you and I had a discussion on the telephone.

A. I'm not sure who I spoke with.

Q. [58] Well, I'll tell you I have spoken with you on the phone before. But to your knowledge, did we ever talk about the facts of the case or get beyond the fact that you wished to assert your attorney/client privilege because you were unsure of whether or not you had been released from that obligation?

A. I'm sorry?

Q. Do you know how far our conversation progressed? Did we ever talk about the facts of this case?

A. We did not.

Q. Have you spoken with anyone who is representing the defendant in this case?

A. I have.

Q. Did your conversations go into the facts of this case?

A. They did.

Q. On Page 3 of your fee declaration sheet, could you please state for the record what is the final entry immediately before the statement total hours on your out-of-court time?

A. On page 3?

Q. Yes, sir.

A. Following the 9/2/94 entry?

Q. [59] Well, the parenthetical following the last dated entry.

A. Other hours exceed the limit.

Q. So as you've testified earlier, just because you reached the fee cap in this case doesn't mean that you quit representing Mr. Wood?

A. Oh, that's correct. I continued to represent Mr. Wood after that.

Q. I'm sorry?

A. I continued to represent Mr. Wood after that. I just didn't put the time on the fee declaration because it seemed pointless to provide the judge with something that had no, bearing on the fee.

Q. If the record reflects that Mr. Ralph testified earlier in this case that Mr. Wood received more representation than most of his paying clients would have gotten due to the nature of his case, would you

agree that that statement would also reflect your treatment of Mr. Wood's case?

MR. HOWLEY: Objection.

THE COURT: Overruled.

A. I don't have an opinion on that.

THE COURT: I didn't hear you.

A. I don't have an opinion about that.

Q. I know it's in your fee declaration, but [60] would you just state for the record whether or not you were paid I think what's called overhead expenses here in Alabama?

A. I'm not sure what you're referring to by overhead expenses.

Q. You did bill The State for some of your expenses in representing—in addition to your out of time—

A. I did.

Q. Did you work at all with the investigator Mr. Pete Taylor?

A. As I recall, my contact with Mr. Taylor was limited. Mr. Dozier was the primary contact.

Q. Did you read any of his reports?

A. I can't recall, but it would seem that I would have read them if they were part of the case file.

Q. Prior to your entry into the profession, did you take the MPRE?

A. I did.

Q. Do you have any familiarity with Rule 1.1 of either the Model Rules of Professional Conduct or the Alabama Rules or even the D.C. Rules?

A. I'm familiar with the rules. I can't recall what Rule 1.1 is off the top of my head.

Q. [61] Rule 1.1—I'll come back to that question when I find Rule 1.1, sir.

Did you have a capital defense notebook in this case?

A. I'm not sure what you're talking about.

Q. A bound version of the book that's put out for lawyers who represent defendants in capital cases that's published by either the Capital Resource Center or the Equal Justice Initiative.

A. I recall purchasing a book from some organization specifically dealing with capital punishment. I don't know if that's the book, that you're referring to.

Q. Do you still have your fee declaration sheet which is marked as Petitioner's Number 3 in front of you?

A. I do.

Q. On Page. 2, the entry on 7/12/94, that reflects a phone call to the Southern Poverty Law Center, does it not?

A. Yes, it does.

Q. And on 8/1/94, that reflects a call to the Alabama Capital Resource Representation Center; is that correct?

A. It does.

Q. [62] And immediately above that entry, you refer to research in a book by the Alabama Resource Representation Center; is that correct?

A. That's correct.

Q. And I believe in one of the letters that was introduced, Petitioner's Number 11, you referred to a diskette with motions on them. Did you, in fact, have a diskette that had motions for these types of cases in this case?

A. That's correct.

MR. HOUTS: May I approach, Your Honor?

THE COURT: You may.

Q. I'm going to show you Alabama Rule of Professional Conduct 1.1. I would just ask if you. would read that and tell me if that refreshes your memory as to what that rule covers.

A. Sorry? What's the question?

Q. Does that refresh your recollection as to what is covered by Rule 1.1 of the Rules of Professional Conduct?

A. It addresses competence.

Q. The committee comments in Alabama, would you read the paragraph immediately above thoroughness in preparation starting with a lawyer may accept?

A. You want me to read it out loud?

Q. [63] No. To become familiar with it.

A. Okay.

Q. Mr. Trotter, do the committee comments of Rule 1.1 of Alabama Rules of Professional Conduct indicate that a lawyer may take a case for which he may not have the competence to handle at the time he takes the case so long as he becomes competent through thorough preparation?

A. That's my understanding of the rule.

Q. So in that vein, you did, in fact, contact the Southern Poverty Law Center, the Alabama Capital Resource Representation Center and other individuals to get books and disks to help you become more familiar with this case?

A. I think that there's two levels of preparation that I had here. One was I was assistant to Mr. Dozier and Mr. Ralph, so the concerns when I was assisting them, I was relying on their criminal law expertise and experience to help me to help them. And, second, I did obtain the books that you referenced and had discussions trying to gain a greater understanding of capital punishment, a

greater understanding of the procedures that lead up to the trial or the hearing, motions that might be necessary to preserve any appellate rights, things that we might [64]—issues that we might want to bring out at the trial in either phase. That was my effort to try and become as competent as possible.

Q. And while you were in law school, did you learn how to file a motion for full recordation of proceedings?

A. I can't recall.

Q. Do you recall if in law school you learned how to file a motion requesting a jury questionnaire?

A. I can't recall.

Q. How about a motion requesting a defendant be allowed to attend trial in civilian clothing?

A. I can't recall. I had a criminal law course in law school—I took a couple of criminal law courses. And whether or not those were discussed in connection with any part of those courses, I can't recall.

Q. Well, is it fair to say that you referred to outside sources to become familiar with these types of motions and to file them with the court?

A. I did my best to refer to outside—to any resource that could help me be as competent as possible to help Mr. Dozier and Mr. Ralph in Mr. Wood's representation.

Q. Now, this case took place a good while ago; [65] correct?

A. That's correct.

Q. And just because you can't remember specific acts today does not mean that you didn't perform specific acts then?

A. That is correct.

Q. And there are actions that you took in this case that are not listed on your fee declaration sheet; is that correct?

A. That is correct.

Q. While you were here in Troy, were you an adjunct professor at Troy State University?

A. I was.

Q. And during your education, did you clerk with the magistrate judge in the Middle District of Tennessee?

A. I did.

Q. And did you also clerk with the Davidson County, Tennessee District Attorney's office?

A. I did.

Q. And at the time of this trial, were you also .a member of the Middle District of Alabama Bar?

A. The federal court?

Q. Yes.

A. I believe I was.

Q. [66] Now, you currently have a pretty extensive civil litigation practice Washington D.C. with Digsby, Shapiro, Morgan, and Oshenski (sp.phon.) and if I butchered any of those names, my apologies. But is that correct?

A. That's correct.

Q. So do you have a lot of current litigation experience?

A. I do.

MR. HOWLEY: Objection.

THE-COURT: Overruled.

Q. As a general matter, as you approach a hearing or a trial, does your level of preparation and day-to-day activities preparing for that case increase or decrease?

A. Could you repeat the question?

Q. As a general matter, as you approach a trial or a hearing, does the amount of day-to-day work that you do in preparation for that hearing increase or decrease?

MR. HOWLEY: Objection.

THE COURT: Overruled.

A. Yes. My experience is that as hearing date or as any court appearance approaches that the level of preparation escalates significantly.

Q. [67] Would that have held true at the time of Mr. Holly Wood's trial?

MR. HOWLEY: Objection.

THE COURT: Overruled.

A. It did.

Q. As far as your experience. I'm sorry. Your personal experience.

A. Exactly. My personal experience, it did.

Q. Now, I believe you could not specifically recall reading the report by Dr. Kirkland in this case?

A. I can't recall specifically reading it. I can recall that we relied upon the report.

Q. If this report states that Mr. Wood denied any history of physical or sexual abuse, would that affect your decision to put on witnesses to testify to undocumented instances of sexual—not sexual—physical abuse during this Mr. Wood's childhood?'

MR. HOWLEY: Objection.

THE COURT: overruled.

A. Would you repeat the question?

Q. Yes, sir. If this report contains a statement that Mr. Wood denied any history of physical or sexual abuse, would that affect your decision to put on

witnesses before the jury in the penalty phase [68] to testify to undocumented allegations of physical abuse?

MR. HOWLEY: Objection.

THE COURT: Overruled.

A. I can't recall what I would have thought at that time. I can say that today that would affect at least my analysis of that issue.

Q. I believe you testified that you commuted during this trial to Montgomery?

A. That's correct.

Q. Do you recall that that drive takes between forty-five minutes and an hour?

A. That's correct.

Q. You've been very open that at the time you were appointed to this case you were a young attorney who had a lot to learn; is that correct?

A. That's correct.

Q. So are you familiar with Section 13A-5-47 of the Alabama Code?

A. I cannot say based on the code number what that is.

MR. HOUTS: May I approach, Your Honor?

THE COURT: You may.

Q. Mr. Trotter, I .apologize if I'm putting you on the spot. But I would ask that you please read [69] just that Section 47 and answer the question of whether or not Alabama law allows for additional evidence to be presented at the sentencing hearing held before the judge that is after the jury sentencing hearing?

MR. HOWLEY: Objection.

THE COURT: Overruled.

MR. HOUTS: Judge, I have case law that may speed this up. May I approach again?

THE COURT: You may.

Q. I'm sorry, Mr. Trotter. This might—would you just please read the underlined portion of this opinion right here?

A. (Witness complies.)

Q. Again, I apologize if I put you on the Spot—But looking at those two sources, are you now familiar with whether or not Alabama law allows for additional evidence in general to be presented at the sentencing hearing held before the court?

A. As to the second source, that's one case. I don't know of other cases, so I have no opinion as to the second source. As to the first source, I was not able to reach a determination at this moment in response to your question.

Q. We'll move on. Do you personally consider [70] court ordered forensic evaluations to be independent evaluations?

A. Are you asking for my understanding today?

Q. At that time, if you know.

A. I don't recall.

Q. How would you define an independent evaluation?

A. Today, I would define it as an evaluation paid my someone other than The State. Since The State is the one prosecuting the defendant, it would seem to me to be truly independent it should be paid by a third source, either the client or some other third party benefactor but someone other than The State.

Q. Would the trial court in your opinion qualify as a third party benefactor, not The State?

A. With all due respect to the judge of the trial court, I still today would believe that a third party

independent evaluation paid for by someone other than The State would be warranted, would be what I would call an independent evaluation.

Q. And. on what basis would you: feel that Dr: Kirkland's report was not independent, or do you have an opinion as to whether Dr. Kirkland's report was independent?

A. I have not reviewed Dr. Kirkland's report [71] since the proceedings in this matter, and I don't have an opinion today about that other than what I've looked at today.

Q. Do you have a copy of Dr. Kirkland's report, Petitioner's Number 4, in front of you?

A. I have Petitioner's Number 4.

Q. Would you please look at Page 3.

A. Okay.

Q. On the lower portion of the page, there are a number of arrests that. Mr. Wood had been subjected to that were noted in this forensic evaluation. As an attorney, if you were in a situation where evidence had been introduced showing that Mr. Wood was described by his family members as good kid, a loving person, a good person, would you want to put before the court or the jury evidence which might negate that possible mitigating circumstance such as a history of run-ins with the law?

MR. HOWLEY: Objection.

THE COURT: Overruled.

A. If you're asking if I would want to put in this arrest record before the jury, the answer would be no.

Q. Could you briefly look through that report and tell The Court whether you see any mention of [72] mental retardation in that report?

A. I note that on Page 3 and 4 it references borderline range intellectual functioning. I don't know if that's what you're referring to. But are you looking specifically for terms of mental retardation?

Q. Correct.

MR. HOUTS: Petition's Number 4 was a part of the trial record; is that correct, Your Honor? Has this already been admitted into evidence?

MR. HOWLEY: I believe it is a part of the trial record.

MR. HOUTS: In an effort to speed things up, Your Honor, I will withdraw that last question.

A. I'm almost done. I've got two pages left.

Q I'll skip any further such questions and just rely on the document itself.

A. I do not see any reference to mental retardation that I can see based on my perusal of the document here in court.

Q. Did Mr. Wood convey any information to you regarding this case during your discussions with him? Do you have any recollection of anything that Mr. Wood would have told you during your discussions of this case?

A. I can't recall anything specifically.

Q. [73] Do you recall if he, in fact, talked to you at all, whether or not you recall the specifics?

A. I mean, I can recall that Mr. Dozier and I met with Mr. Wood and that discussions took place. I don't recall what was discussed specifically.

Q. On Petitioner's Number 11, which was the letter in which you indicate that you were feeling some stress, would you characterize your stress as reflecting your understanding of the potential punishment that could be imposed on your client?

A. With regard to this letter, a lot of years have passed since then. I've worked on a lot of cases. My feeling at that time was that I was apparently very frustrated and stressed out. Part of that have could have been due to the magnitude of the responsibility that Mr. Dozier and Mr. Ralph and I were carrying in our representation of Mr. Wood. Part of that could have been the fact that the things that were assigned to me were stressful, preparing the stuff for the penalty phase.

Today, I can't say in fairness to Mr. Wood and Mr. Dozier that this situation here is unlike a lot of the situations that happen in law firms where somebody will assign a project to an associate and that person goes off and works independently and comes [74] back and reports the material.

At that time, I definitely felt stressed out and frustrated because of the assignments that had been delegated to me and I was doing my best to carry them out. And I had consulted with Mr. Doyle apparently about that. I can't say that this was the feeling that I had throughout the entire time of representation of Mr. Wood.

Q. You sort of answered my next question in advance. But can you recall times that you met with Mr. Dozier and Mr. Ralph after August 16, 1994, and discussed this case?

A. I do. And my understanding was is that they were working throughout this time period as well. At that time they were working and pulling their parts of the case together that my part of the, puzzle—what I was doing was one piece of the puzzle. And I was stressed out about my piece of the puzzle, but I understood that they were also working on parts of the puzzle.

MR. HOUTS: Thank you, Mr. Trotter.

MR. HOWLEY: Very brief redirect, Your Honor.

REDIRECT EXAMINATION

BY MR. HOWLEY:

Q. [75] Mr. Trotter, referring you back to Exhibit 3, the third page, at the end of your out-of-court time where it says other hours exceed the limit, how much were you paid for the other hours that exceeded the limit?

A. I wasn't paid for those hours.

Q. Looking on the first page of Exhibit 3, can you tell us what the amount of Your expenses were that were reimbursed by The State?

A. Extraordinary expenses that call for extraordinary expenses?

Q. Yes.

A. $261.89

Q. And were those actual out-of-pocket expenses?

A. No. That was what I felt that the law permitted me to submit. I mean, I suppose if I had wanted to try and get recovery for other things, then I could have, but I did not. I can recall, for example, for the trial for the actual penalty phase, I purchased an easel tripod and an easel so that I could have some sort of visuals to support the case to what I was trying to convey to the jury. I don't recall that I would have submitted anything like that, for example, on this fee submission report [76]—this fee declaration.

Q. Looking at the third page of Exhibit 3 where it says expenses, are those the expenses that appear on the extraordinary expenses line on Page 1?

A. The amounts are the same, so it appears to be the same.

Q. And did you actually incur the expenses that are listed on Pages 3 and 4?

A. I did.

Q. And did you incur expenses over and above this for which you were not reimbursed?

A. Sure, absolutely. For example, I don't recall that the book that I purchased from the Southern Poverty Law Center is on here. I don't believe that would have been something that I just wouldn't have expected or thought that the judge would have approved, so I didn't submit it.

Q. Were you reimbursed for any overhead?

A. By overhead, you mean office expenses?

Q. Yes.

A. No.

Q What course or courses did you teach as an adjunct professor at Troy State University?

A. I taught business law. As I recall, that involved uniform commercial codes and contracts [77] specifically.

Q Did you ask Mr. Wood whether he had ever been subjected to physical abuse?

A. I can't recall.

Q. Did you ask him whether he had ever been hospitalized?

A. I don't know.

Q. Did you ask any of his family members about the arrests that are listed in the Kirkland report?

A. I can't recall.

Q Did you discuss the arrest listed in the Kirkland report with any mental health professional?

A. Excuse me? Would you repeat that?

Q. Did you discuss the arrests that are listed in the Kirkland report with any mental health professional?

A. I recall today from looking at the fee declaration that it appears I discussed the report with Mr. Kirkland.

Q. Do you recall in your discussions with Mr. Kirkland whether you talked about the arrests that are listed in his report?

A. I can't recall.

Q. Did you do anything to determine whether the statements that are made in the Kirkland report were [78] accurate?

A. Me personally?

Q. Yes.

A. I can't recall.

Q. Did you do anything to determine whether the statements made in the Kirkland report were true?

A. I personally can't recall doing anything to determine if they were true.

Q. Are you aware of anything that your co-counsel did to determine whether the statements in the Kirkland report were accurate or true?

A. I know Mr. Dozier had a relationship with Pete Taylor who was the private investigator. To what extent Mr. Taylor was used to corroborate any of this information, I'm not aware. But it would seem that that would be one of the options.

MR. HOWLEY: Your Honor, I have a note that says I forgot to move Exhibit 11 into evidence. I'd like to do that at this time.

MR. HOUTS: No objection by The State.

MR. HOWLEY: I have no more questions for Mr. Trotter.

RECROSS-EXAMINATION

BY MR. HOUTS:

Q. Again, I'm sorry, Mr. Trotter, if it seems [79] like I'm giving you a prep course for the MPRE all over again. But are you aware that in Alabama attorneys who are admitted to practice law must zealously and competently represent indigent defendants on cases that they are appointed regardless of compensation?

A. That's correct.

Q. And in this case, did you in your opinion up hold your ethical duty to Mr. Wood?

A. I did my best to uphold my ethical duty to Mr. Wood. I certainly billed way over and above the hours that are on the report as the trial approached and spent even more time and can recall nights where I stayed up working on my easels and demonstrations for the actual penalty phase. I would like to have done more. I wished I could have done more. And I recall that at the penalty phase the verdict was ten to two. And I felt like if I could have just done a little more that maybe it would have been nine to three and that that would have been enough. And I regret that whatever it was to require that little more wasn't there.

Q. Have there been instances since that time that you have tried maybe large complex litigation cases that perhaps you have lost and felt [80] like you wished you would have done something more or something different or something above what you did, in fact, do?

A. My life has been good fortunately since Mr. Wood's case, and I've had a number of major cases that I've worked with. But certainly I think that we can always strive to do better. And I certainly—I

wished that the outcome had been different in Mr. Wood's case.

Q. You've represented policy holders in multi-partied insurance coverage cases; is that correct?

A. That's correct.

Q. Do you happen to recall specific conversations that you may have had with witnesses say in cases back in 1996 or 1997, every single conversation that you ever had with anyone?

A. My experience as a litigator is that—and I've dealt not only in insurance but antitrust, contract disputes—is that I absorb a tremendous amount of information while the case is pending and ongoing. And thereafter, it's almost like the information is purged to make room for the new information. And unfortunately I don't recall a lot of information about cases that I handled in '96 or [81] '95. I wished that I had and that it was where I could recall more. But that is my experience that there seems to be a file purge at the end of a case to make room for the next one.

MR. HOUTS: Thank you, Mr. Trotter.

MR. HOWLEY: Nothing further, Your Honor. Your Honor, do you want to proceed with the next witness or break? I think it's probably best if we break. While this witness will not go on all afternoon, he's not going to be brief.

THE COURT: Be back at 1:30.

(A lunch break was had in the proceeding.)

MS. MICHAELSON: Petitioner calls R. C. Pete Taylor.

R. C. TAYLOR

was sworn and testified as follows:

DIRECT EXAMINATION

BY MS. MICHAELSON:

Q. Good afternoon, Mr. Taylor. If I speak too quickly, please just let me know.
A. I will.
Q. Could you please state your name?
A. My name is R.C. Taylor. I'm also more commonly known as Pete Taylor.
Q. And where do you reside?

State of Alabama Unified Judicial System Form C-62A 10/1/90	TORNEY'S FEE DECLARATIO.. (Adult)	Case Number 2 CC-94-7

Mark appropriate court:

THIS FORM MUST CONTAIN ORIGINAL SIGNATURES OF THE ATTORNEY AND THE JUDGE. THIS FORM WITH ATTACHED ITEMIZATION MUST BE SUBMITTED TO THE TRIAL COURT JUDGE OR PRESIDING JUDGE OR CHIEF JUSTICE OF THE APPELLATE COURT FOR APPROVAL. AFTER APPROVAL THE CLERK SHALL SUBMIT THE ORIGINAL DECLARATION TO THE STATE COMPTROLLER FOR AUDIT AND ALLOWANCE. MAIL TO: *State Comptroller, Room 103 Alabama State House, Montgomery, Alabama 36130.*

Filed in the Clerk's Office on this 9th

day of DECEMBER, 19 94.

DEC 1994

EXHIBIT
Petitioner's
1

IN THE CIRCUIT COURT OF
PIKE COUNTY, ALABAMA

CASE NO. CC-94-7

STATE OF ALABAMA,
Plaintiff,

vs.

HOLLY WOOD,
Defendant.

OUT OF COURT

02/03/94	Opening File	0.2
02/04/94	Conferring with Defendant	6.0
02/05/94	Research	1.0
02/07/94	Research	2.5
02/23/94	Conferring with Defendant	2.0
03/01/94	Conferring with Investigator	0.2
03/08/94	Reviewing File and Research	3.0
03/22/94	Reviewing Reports and Research	1.0
03/24/94	Preparing Motions	2.5
03/30/94	Research	2.0
04/05/94	Conferring with Investigator.	1.0
04/11/94	Reviewing Lab and Crime Reports	2.0
04/14/94	Research	4.0
04/28/94	Transcribing Tapes	2.0

05/11/94	Research	1.5
05/20/94	Conferring with Investigator	1.5
05/23/94	Conferring with Investigator	1.0
05/24/94	Evaluating Physicological Reports	1.0
05/25/94	Transcribing Investigator Tapes	1.5
05/26/94	Conferring Investigator	0.5
06/23/94	Conferring with Investigator	0.5
06/24/94	Transcribing Investigator Tapes	1.5
07/20/94	Reviewing File and Research	1.0
08/19/94	Reviewing File, Motions and Responses	3.0
08/29/94	Research	3.0
08/31/94	Evaluating Jury List	1.5
09/29/94	Research	2.5

(Other hours exceed the limit)

TOTAL OUT OF COURT HOURS: 50.0

IN COURT

09/02/94	Striking Jury	3.5
10/17/94	Trial	11.2
10/18/94	Trial	10.1
10/19/94	Trial	9.9
10/20/94	Trial	10.1
10/21/94	Jury Sentencing Phase	8.0
12/02/94	Hearing	1.5
12/09/94	Sentencing	0.5

TOTAL IN COURT HOURS: 54.8

/s/ CARY L. DOZIER
CARY L. DOZIER

S File

State of Alabama
Unified Judicial System

ATTORNEY'S FEE DECLARATION

Case Number

certiorari to the Alabama Supreme Court) and in post-conviction proceedings.

THIS FORM MUST CONTAIN ORIGINAL SIGNATURES OF THE ATTORNEY AND THE JUDGE. THIS FORM WITH ATTACHED ITEMIZATION MUST BE SUBMITTED TO THE TRIAL COURT JUDGE OR PRESIDING JUDGE OR CHIEF JUSTICE OF THE APPELLATE COURT FOR APPROVAL. AFTER APPROVAL, THE CLERK SHALL SUBMIT THE ORIGINAL DECLARATION TO THE STATE COMPTROLLER FOR AUDIT AND ALLOWANCE. MAIL TO: *State Comptroller, Room 103 Alabama State House, Montgomery, Alabama 36130.*

Filed in the Clerk's Office at Troy, Alabama, on this 14 day of Feb, 19 85

Eric A. Hill Pinnock

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Date Claim Received:	
Voucher Number:	
Voucher Date:	
Amount Approved:	
Warrant Number:	
Warrant Date:	

EXHIBIT
Pet. Ex 2

STATE OF ALABAMA V. HOLLY WOOD
CASE NUMBER CC-94-7

IN-COURT PREPARATION:

09/02/94	Motion Hearing	3.5
10/17/94	Jury Trial	11.5
10/18/94	Trial	10.4
10/19/94	Trial	9.9
10/20/94	Trial	10.3
10/21/94	Trial	8.2
12/02/94	Hearing	1.6
12/09/94	Hearing	2.0
	TOTAL IN-COURT HOURS	57.4

OUT-OF-COURT PREPARATION::

03/08/94	Open File	.5
03/08/94	Copy Court File at Clerk	1.5
03/09/94	Review File Material	3.0
03/22/94	Review reports & research	1.0
03/24/94	Preparing Motion & review	2.5
03/30/94	Research & Preparation	2.0
04/05/94	Conf. with Co-Counsel	1.0
04/11/94	Reviewing Criminal reports	2.0
04/13/94	Legal Research on Capitol case	4.0
04/28/94	Research & Preparation	3.5
05/20/94	Conf. with Investigator & Co-Counsel	1.0
05/23/94	Conf. with Co-Counsel & Investigator	1.0
05/24/94	Review Psychological Material.	2.5
05/26/94	Conf. with Mr. Dozier	1.0
06/24/94	Review reports of Investigation	2.0
07/19/94	Research & Preparation	2.5
08/20/94	Review Motion & Pleadings; Research for Hearing	6.0
08/31/94	Review Jury List & Voir Dire Preparation	4.0

09/19/94 Trial Preparation 4.0
10/07/94 Trial Preparation; Prepare Voir Dire;
Research for Jury Charges Capitol Case 5.0
Remaining hours exceed the limit and are not listed -

TOTAL HOURS CLAIMED 50.0

EXTRAORDINARY EXPENSES:

Foshee & Turner Court Reporters—$1,002.00
Mileage: 136 @ .25 = $ 34.00
Copies: 280 @ .25 = $ 70.00
$104.00

State of Alabama Unified Judicial System	ATTORNEY'S FEE DECLARATION	Case Number One

NOTICE TO ATTORNEY AND JUDGE: Sections 15-12-21 through 15-12-23, *Code of Alabama 1975*, provide for the payment of attorney fees and extraordinary expenses incurred by counsel appointed to represent indigent defendants on the trial level, on appeal (including petition for writ of certiorari to the Alabama Supreme Court) and in post-conviction proceedings.

THIS FORM MUST CONTAIN ORIGINAL SIGNATURES OF THE ATTORNEY AND THE JUDGE. THIS FORM WITH ATTACHED ITEMIZATION MUST BE SUBMITTED TO THE TRIAL COURT JUDGE OR PRESIDING JUDGE OR CHIEF JUSTICE OF THE APPELLATE COURT FOR APPROVAL. AFTER APPROVAL, THE CLERK SHALL SUBMIT THE ORIGINAL DECLARATION TO THE STATE COMPTROLLER FOR AUDIT AND ALLOWANCE. MAIL TO: *State Comptroller, Room 103 Alabama State House, Montgomery, Alabama 36130.*

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Pet Ex # 3

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2001 PARK PLACE NORTH
220 PARK PLACE TOWER
BIRMINGHAM, ALABAMA 35203
251-4200/1-800-888-DEPO/FAX 252-5644
EMPLOYERS IDENTIFICATION NO. 63-1109073

KENNETH TROTTER
ATTORNEY AT LAW
207 MONTGOMERY ST
SUITE 212
MONTGOMERY, AL 36104

November 1, 1994
Invoice# 74598
Balance: $1,002.00

Caption: STATE OF ALABAMA VS HOLLY WOOD
File No: TROY
Scheduled: 10/17/94 Billed: 10/28/94
Reporter: ANGELA SMITH

Invoicing Information Charge

Description Amount	Amount
4.00 PER DIEM @ $100.00 PER DAY	400.00
86 PAGES @ 7.00 PER PAGE: ORIGINAL TRANSCRIPT	602.00

CAPITAL MURDER TRIAL-COURT RATES-EXPEDITED

INVOICE CORRECTED 11/1/94 PER REPORTER.--

Please Remit Total Due: $1,002.00

PAYMENT DUE UPON RECEIPT-PLEASE INCLUDE INVOICE#

Employers Identification No 63-1109073

ATTORNEY'S FEE DECLARATION, PIKE COUNTY, ALABAMA
CASE NO: CC-94-7

IN COURT

9-2-94	Motion hearing	3.5
10-17-94	Trial	11.2
10-18-94	Trial	10.1
10-19-94	Trial	9.9
10-20-94	Trial	10.1
10-21-94	Jury Sentencing Phase	8.0
12-02-94	Hearing	1.5
	total hours	54.3

Out of Court

2-3-94	Opening file	.2
2-7-94	Research re: capital defense	3.6
2-8-94	Research re: capital defense	1.2
2-11-94	Making Copies of File at courthouse	.5
2-11-94	reviewing Court file	.5
2-11-94	Travel to Courthouse	.4
2-23-94	meet with client at jail	2.0
3-1-94	Phone call re: police on 2nd shift	.1
3-10-94	reviewing correspondence from client	.2
3-22-94	motion for extra expenses	.2
4-22-94	review of letter from dept. of health	.2
4-22-94	review of investigator's, work	2.0
5-5-94	visit to D.A. to view Photos	.7
5-10-94	conversation with Dr. Kirkland	.5
5-11-94	discussing case with Cary Dozier	.5
5-12-94	discussing case with Cary Dozier	.2
5-26-94	evaluating investigative reports	1.5
6-28-94	call to Susan Wood re: Holly	.5
6-28-94	call to Cary re: subpoenas	.2
6-28-94	call to attorney re: subpoenas	.2
6-28-94	subpoena ducas tecum	.5

6-28-94	call to Luverne High	.2
6-29-94	review file	.7
7-9-94	research at supreme court	2.0
7-12-94	phone call to southern poverty law center	.2
7-20-94	call to luverne high	.1
7-20-94	call to Frank Ralph re: case	.1
7-20-94	call to Cary Dozier re: case	.1
7-28-94	research in ACRRC book re: motions	5.0
8-1-94	call to ACRRC (Alabama Capital Resource Representation Center)	.1
8-1-94	research re: motions	2.0
8-2-94	call to Cary Dozier re: reports	.1
8-3-94	call to attorney re: case strategy	.4
8-3-94	call to attorney re: case, strategy	.4
8-3-94	call to attorney re: case strategy	.3
8-4-94	call to attorney re: trial	.4
8-4-94	notes to file	.5
8-4-94	call to ACRRC re: motions	.1
8-8-94	preparing motions: trial memorandum	1.0
8-8-94	preparing motion: full recordation	1.0
8-8-94	preparing motion: D.A. disclosure	1.0
8-8-94	preparing motion: production	1.0
8-8-94	preparing motion: sequestration	1.0
8-8-94	preparing motion: invoke the rule	1.0
8-9-94	preparing motions: jury questionnaire	1.0
8-9-94	preparing motion: victim evidence	1.0
8-9-94	preparing motion: extensive voir dire	1.0
8-9-94	preparing motion: civilian clothes	1.0
8-9-94	preparing motion: exclude evidence	1.0
8-9-94	preparing motion: discovery	1.0
8-9-94	call to Frank Ralph re: motions	.1
8-9-94	call to Frank Ralph re: motions	.1
8-9-94	call to Clerk re: questionnaires	.1
8-16-94	call to Cary dozier re: motions	.1
8-16-94	call to Frank Ralph re: motions	.1
8-16-94	call from Cary Dozier re: motions	.2

9-1-94	preparation for motion hearing	8.0
9-2-94	travel to/from court	2.0
	(other hours exceed the limit)	
	total hours	52.3

EXPENSES

2-11-94	4 miles	1.00
2-23-94	4 miles	1.00
5-5-94	4 miles	1.00
6-28-94	long distance phone call	2.50
6-28-94	long distance phone call	2.40
6-28-94	long distance phone call	.24
6-28-94	3 copies	.75
6-28-94	information phone call	.50
7-20-94	long distance phone call	.72
7-20-94	long distance phone call	.24
7-20-94	long distance phone call	1.20
8-2-94	long distance phone call	1.20
8-3-94	long distance phone call	4.80
8-3-94	long distance phone call	4.80
8-4-94	long distance phone call	4.80
8-9-94	long distance phone call	.72
8-9-94	long distance phone call	.96
8-9-94	long distance phone call	1.44
8-16-94	long distance phone call	1.20
8-16-94	long distance phone call	.48
8-18-94	postage stamps	4.32
8-18-94	90 copies	22.50
9-1-94	30 copies	7.5
9-2-94	100 miles	25.00
9-11-94	long distance collect phone call from client's family re: clothes	3.20
9-11-94	long distance from client re: hearing	4.40
10-17-94	100 miles	25.00
10-17-94	10 copies	2.50
10-18-94	100 miles	25.00
10-19-94	100 miles	25.00

10-20-94	100 miles		25.00
10-21-94	10 copies		2.50
10-21-94	100 miles		25.00
12-2-94	15 copies		3.75
12-2-94	100 miles		25.00
12-30-94	15 copies		3.75
12-31-94	postage		.52
		total expenses	261.89

Supreme Court, U.S.
FILED
AUG 3 - 2009
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CAPITAL CASE
No. 08-9156

IN THE

Supreme Court of the United States

HOLLY WOOD,
Petitioner,

v.

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama,
and GRANTT CULLIVER, Warden,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX
VOLUME II OF II

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PETITION FOR WRIT OF CERTIORARI FILED MARCH 12, 2009
CERTIORARI GRANTED MAY 18, 2009

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Appendix to the Petition for Writ of Certiorari at the cited pages.

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* * *

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Document	Page
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[12]Kirkland King & Renfro
Clinical Psychologists P.C.

1520 Mulberry Street
Montgomery, Alabama 36106-1520
(205) 269-1106

Licensed Psychologists

Karl Kirkland, Ph.D.
Glen D. King, Ph.D. ABPP
Guy J. Renfro, Ph.D

Name: Holly Wood
Case No.: CC-94-7
D.O.B.: [REDACTED]
Date of Eval: 05/11/94

OUTPATIENT FORENSIC EVALUATION REPORT

DATE OF REPORT: 05/13/94

REFERRAL INFORMATION

Mr. Holly Wood, a 33 year old single black male, was referred for a forensic psychological evaluation by the Honorable Robert W. Barr, Circuit Court Judge, Pike County Alabama. The reason for referral was to provide a current forensic psychological evaluation in reference to the defendant's competency to stand trial and mental state at the time of the offense. This evaluation followed a request for said evaluation by Mr. Wood's attorneys, Mr. Frank Ralph, and Mr. Ken Trotter, and Mr. Cary Dozier. The motion for evaluation was subsequently grated by Judge Barr based on the finding of there being sufficient evidence to warrant inquiry, in the interest of justice, into the mental responsibility and mental capacity of the defendant. Mr. Wood is charged with Capital Murder.

NOTIFICATION

Prior to beginning the examination, the defendant was informed of the purpose and limited confidentiality of the information to be obtained. He was told that the results would be submitted to the court in the form of a written report, with copies made available to his attorney and the District Attorney. He was also informed that these results might be used in court proceedings, in the form of either the written report or testimony by the examiner. He was furthertold that this information night be used to helpreach decisions concerning his competency to stand trial and mental state at the time of the alleged offense but that none of the information would be used against him concerning the charge itself. The defendant indicated that he understood the purpose and limited confidentiality of the evaluation, agreed to proceed, and signed the Notification of Rights Form.

SUMMARY OF ALLEGED OFFENSE

According to records from the Troy Police Department on September 1, 1993 at 9:35 p.m. the Troy Police Department received a call concerning a shooting at [REDACTED] in Troy, Alabama. Upon arrival officers found Ruby Gosha, the victim in this Case, lying in her bed suffering from a massive gunshot wound to the head. The victim was transported to Edge Memorial Hospital in Troy Alabama where she died a short time later. The officers present questioned the other individuals present the home and subsequently learned that Ms. Gosha was having domestic problems with the defendant is this case. Allegedly witnesses reported that the defendant had recently threatened the victim and a cutting incident with a knife had occurred earlier in the week prior to the alleged offense in which he cut her on the arts,

with a knife. No charges were filed in that offense. The defendant is the father of the victim's child. A witness in the case saw a black matching the description of this subject leaving the house at the time of the shooting. The victim had no other known enemies. The defendant had been paroled on June 14, 1993 to live with this victim who was his girlfriend. After his arrest the subject allegedly made statements to police that indicated direct knowledge of the incident that they had not discussed with him at that point in the investigation according to police records.

DATA SOURCES

Data sources for this report include a review of the defendant's department of corrections file, a review of the DA file, an interview with the defendant's attorney Mr. Cary Dozier by telephone, and a comprehensive evaluation of the defendant

CLINICAL ASSESSMENT

Mr. Holly Wood is a 33 year old single black male. He is a right handed individual who is 5'7" tall and weighs 170 lbs. At the outset of this evaluation he stated "I don't need this evaluation—I've got plenty of sense—I'm not crazy I never have been". He readily understood the Notification of Rights and also cooperatively participated in the evaluation. He is housed in a segregation unit at Kilby Correctional Facility because he is charged with a capital crime. He is not taking any medication at the time of the evaluation. The evaluation was completed during a two and one half to three hour period in the social services department of Kilby Correctional Facility. The room was adequate in terms of privacy, lighting, and temperature. Mr. Wood was not handcuffed at the time of the evaluation.

Holly Wood was cooperative, attentive, and interested in the evaluation process. He was neatly dressed and groomed in common prison attire. He appeared to have good hygiene. This young man has no outstanding marks or scars that were readily noticeable during this evaluation. He denies any history of serious injury or disease. He has no history of seizure disorder, head injury, or headaches. He denies any history of hospitalizations. He has never taken any psychoactive medication.

Holly Wood denies current abuse of alcohol. In the past he describes himself as being a social drinker. He denies using any alcohol or drugs on the day of the alleged offense. He reports that he did use marijuana as a teenager and hasn't smoked pot in years. He denies any sexual or physical abuse. He denies any history of criminal victimization.

Holly Wood reports that he has one previous arrest in April of 1984 for Assault, I. In this offense he shot his girlfriend at the time. He received a 15 year sentence. He shot her through the window of her apartment after seeing her with another man. He has the following other prior arrests between 1981 and 1984:

09/15/81	Disturbing the Peace
11/18/81	Speeding
02/10/82	Criminal Possession of a Forged Instrument
08/0782	Speeding
09/05/82	Improper Tag
11/06/82	Theft of Property, III
02/09/83	Speeding
04/21/83	Reckless Endangerment
05/10/83	Failure to Appear

06/03/83	Theft of Property, Ill
07/14/83	Reckless Driving
08/19/83	Theft of Property, III
10/11/83	Speeding
10/13/83	Attempt to Elude
03/04/84	Disorderly Conduct
06/19/84	Harassment
08/17/84	Driving Without a License

Mr. Holly Wood has been evaluated at Kilby Correctional Facility as recently as November of 1992. In that evaluation he produced an IQ in the borderline range of intellectual functioning. He was assessed with the WRAT-R reading scale. Results reveal that, he is reading on a 3rd grade level. His MMPI suggested problems with impulse control and acting out behavior. He apparently produced a valid MMPI that was consistent with someone who was reporting alienation from others, problems with depression, and problems with anger and impulse control.

Clinical interview reveals a normal thought process. His thinking was goal directed and logical. His speech was normal in terms of flow, rate, tone, and rhythm. His speech was understandable. Current assessment of reading level confirms that he is still reading on less than a 3rd grade level.

Mr. Holly Wood evidenced a normal affect. He did become somewhat excited and agitated while talking about the case. He did report a history of poor anger control. He did not evidence any memory deficits. He was able to correctly identify three out of three objects after five seconds, fifteen seconds, and two minutes. He is able to name the current governor of Alabama but could not name the current president. Despite his low reading level he reports that he is able to benefit from reading law books in prison and

the Bible. He evidenced concrete reasoning ability. He could not use abstraction skills much beyond the low average range of intellect. This assessment would suggest that he is functioning, at most, in the borderline range of intellectual functioning. This patient has no history of hallucinations or poor reality contact. He does not evidence delusional thinking. He denies any history of suicidal ideation. He does report that he has felt injurious toward others in the past. He made specific reference to the previous assault charge. He denies any other homicidal ideation.

With regard to results of the current clinical interview the following diagnoses are made:

DSM-III-R DIAGNOSES

Axis I	No Code
Axis II	Probable Borderline Intellectual Functioning Antisocial Acts
Axis III	No Known Code
Axis IV	Severity of Psychosocial Stressors 3-moderate, current incarceration
Axis V	Global Assessment of Functioning: 65 mild to moderate symptoms of social and occupational impairment

FORENSIC ASSESSMENT

COMPETENCY TO STAND TRIAL

Mr. Holly Wood was evaluated utilizing the Competency to Stand Trial Assessment Instrument (CAI) as well as a court room geographic marker. He was able to correctly identify the various geographic locations of court officials. He was able to indicate a knowledge of the charges against him as well as the range and nature of possible penalties. He felt he had

been successful in increasing his knowledge of the court process because he has been "studying law books". He is able to discuss the different roles of court officials as follows. He reported that the role of his attorney is to "represent me on the case—help me beat the case". He said that the role of the District Attorney is to "try to prosecute the case and get a guilty conviction". He reports that the role of the judge is to "sentence you" and he also stated that the judge is "in charge of the case". He knows that his judge is a "new judge who used to be an assistant DA". He reports that the role of the jury is to "listen to evidence and decide". He correctly identified himself as the defendant and reports that the role of the witness is to "testify and tell the truth". He recognized that he did not have to testify against himself He was able to define plea bargaining as "accept the charge and plead guilty and they'll sentence to you less time". With regard to not guilty by reason of insanity he indicated that it means "that you weren't competent at the time of the incident". He has a good relationship with his attorneys. He is able to discuss his case in detail with his attorneys. Unmanageable behavior is not likely to occur. He knew that the judge "can override the jury and sentence you". He further stated that the judge is "the head of the court and is there to keep order-he can do like he wants to because he's in charge".

Based on these findings, it is my opinion that Mr. Wood is capable, at this time, of assisting his attorney in his defense and fully participating in the process of a trial.

MENTAL STATE AT THE TIME OF OFFENSE

The defendant has a complete memory of his behavior at the time of the alleged offense. He is at least

functioning in the borderline range of intellect. There was not a mental disorder present that would detract from his ability to appreciate the criminality of behavior with regard to this specific alleged instant offense. Mr. Wood does not deny any relationship between substance abuse or emotional factors and his alleged behavior on the day in question. He refuses to discuss any details of his specific behavior on the day of the alleged offense and indicated that he has an alibi defense. He was quite willing to discuss the lack of drugs or alcohol on the day of the offense. He also denies any problems with memory. There is no allegation of any mental disorder factors in the explanation of thought or behavior process variables at all on the day of the alleged offense. Mr. Wood feels that he is being railroaded into the current charges according to his self-report.

Review of collateral data and interview data with this defendant do not reveal the presence of a mental disorder that would bear any causal relationship to his alleged behavior on the day of the offense. Therefore there is no disorder present that would detract from his potential ability to appreciate the criminality or wrongfulness of behavior at the time of the alleged offense.

SUMMARY AND RECOMMENDATIONS

In summary, this forensic psychological evaluation of Holly Wood reveals that he is capable of assuming the role of defendant at this time. Evaluation further reveals the absence of any mental disorder that would detract from his ability to appreciate the criminality or distinguish right from wrong at the time of the instant offense. Therefore it is recommended that this case should proceed toward trial. It is not clear from the history or records that Mr. Wood has

any history of any type of mental disturbance whatsoever. He does report that he has not had a problem with alcohol or drugs. He does not appear to need any psychoactive medication.

As a forensic psychologist, I recognize that the determination of a defendant's competency to stand trial and mental state at the time of an alleged offense are properly matters for the court to decide. Therefore, the opinions offered in this report with regard to these issues are properly matters for the court to decide. I appreciate the opportunity of participating in the evaluation of this individual with you.

Respectfully Submitted,

/s/ Karl Kirkland, Ph.D.
Karl Kirkland, Ph.D.
Licensed Psychologist
Certified Forensic Examiner

OUTPATIENT FORENSIC EVALUATION
ADDENDUM

DATE OF REPORT: 05/13/94

DEFENDANT'S VERSION OF ALLEGED OFFENSE

Mr. Holly Wood insists that he has an alibi for this offense. He basically gives the following version of the offense:

> "They are trying to railroad me this case—the judge assumes I did it and he told me so at the arraignment—he don't like me. I was living with Ruby Gosha at the time I spent the night at ray father's house in Luverne and had been working on a car the night before."

The defendant refused to discuss details of the day of the alleged offense but he did claim an alibi defense. He denied using any drugs or alcohol on the day of the offense. He denied any memory gaps. There are no allegations or any causal relationship between cognitive or emotional factors and behavior in question on the day of the alleged offense.

PERTINENT SOCIAL HISTORY

Holly Wood was born in Pike County Alabama on [REDACTED]. He was born at home. His father J.T. Wood is a disabled veteran who lives in Luverne, Alabama. His mother Betty Jean Simmons died from pneumonia in the late 1970s. His parents never married and his father was never in the home while he was being raised. He was raised by his mother and his maternal grandmother. He grew up in the Springhill community in rural Pike County Alabama near Troy, Alabama. He has six sisters and no brothers. He has a 9th grade education. He reports that he is able to read but clearly his reading ability

brought into question by the results of this evaluation. He reports that he was suspended from Luverne High School on one occasion for fighting. He denies any other suspensions.

Mr. Holly Wood has never married. He denies assaultive behavior towards others. He denies any history of spousal abuse. He reports that he has never been abusive toward women except on the one occasion which was an assault arrest. This arrest was discussed above.

Previous probation reports indicate that this patient has had a problem in the past with stealing. In particular he has been accused of stealing gas from gas stations by driving off and never paying for the gas. Employment history reveals that he has done various types of construction work and farm work in the past. He has worked as a cement finisher. He worked for a bottling plant in Troy with a track route for two years. He reports that the best job he has ever had involved doing cement finishing. His longest job was in the Coca Cola Plant.

Should further social information become available that is relevant to the forensic issues raised in this report an addendum will be file.

Respectfully Submitted,

/s/ Karl Kirkland, Ph.D.
Karl Kirkland, Ph.D.
Licensed Psychologist
Certified Forensic Examiner

State of Alabama
Unified Judicial System

CASE NUMBER 21

CL

Address _____

_____ Zip _____

10. Name _____

Address _____

_____ Zip _____

METHOD OF SERVICE REQUESTED:

☒ Personal ☐ Other _____

Party Requesting Subpoena

Kenneth B. Tretter for Defend

Signature

Date _____ _____
Clerk/Register

264-0900
Requester Phone No.

Pet #5

334

IN THE CIRCUIT COURT OF
PIKE COUNTY, STATE OF ALABAMA

CASE NO: CC-94-7

STATE OF ALABAMA,
Plaintiff,

vs.

HOLLY WOOD,
Defendant.

ORDER TO APPEAR

TO: Susan Wood Caldwell

ADDRESS: (physical address) [REDACTED]
Luverne, Alabama 36049

(mail address) REDACTED
Luverne, Alabama 36049

YOU ARE ORDERED TO APPEAR to testify on behalf of Holly Wood in the above-entitled action before the court named above on the date, time and place stated below. This order is subject to all judicial enforcement and sanction. See below if you have further instructions.

DATE: October 17, 1994.

TIME: 9:00 A.M.

ROOM: Main Courtroom

ADDRESS: Pike County Courthouse, Troy, Alabama

INSTRUCTIONS: You are ordered to appear at trial and to remain in attendance on the Court until discharged.

Person requesting subpoena: Kenneth B. Trotter
Attorney for Defendant
Bell Building
207 Montgomery Street,
Suite 212
Montgomery, AL 36104

DATE: 6-29-94

/s/ Brenda Peacock
Brenda Peacock
Circuit Clerk

RETURN ON SERVICE

I hereby certify that I personally delivered a copy of this Order to Susan Wood Caldwell on 7-1, 1994

_____
Signature and Title of Process Server

Served by Mail
Date Mailed

/s/ illegible
Signature of Sheriff and/or Deputy

IN THE CIRCUIT COURT OF
PIKE COUNTY, STATE OF ALABAMA

CASE NO: CC-94-7

STATE OF ALABAMA,
Plaintiff,

vs.

HOLLY WOOD,
Defendant.

ORDER TO APPEAR

TO: Johnnie Pearl Wood

ADDRESS: [REDACTED]
Luverne, AL 36049

YOU ARE ORDERED TO APPEAR to testify on behalf of Holly Wood in the above-entitled action before the court named above on the date, time and place stated below. This order is subject to all judicial enforcement and sanction. See below if you have further instructions.

DATE: October 17, 1994

TIME: 9:00 A.M.

ROOM: Main Courtroom

ADDRESS: Pike County Courthouse, Troy, Alabama

INSTRUCTIONS: You are ordered to appear at trial and to remain in attendance on the Court until discharged.

Person requesting subpoena: Kenneth B. Trotter
Attorney for Defendant
Bell Building
207 Montgomery Street,
Suite 212

Montgomery, AL 36104

Date: 6-29-94

/s/ Brenda Peacock
Brenda Peacock
Circuit Clerk

RETURN ON SERVICE

I hereby certify that I personally delivered a copy of this Order to illegible on July 05, 1994

/s/ deputy sheriff
Signature and Title of Process Server

Served by Mail
Date Mailed

/s/ illegible
Signature of Sheriff and/or Deputy

IN THE CIRCUIT COURT OF
PIKE COUNTY, STATE OF ALABAMA

CASE NO: CC-94-7

STATE OF ALABAMA,
Plaintiff,

vs.

HOLLY WOOD,
Defendant.

SUBPOENA DUCES TECUM

TO: Custodian of Records
Luverne High School
1st Avenue
Luverne, AL 36049

You are hereby ordered to appear in the above named court on the following listed date, time and place and bring the following documents, books, or papers or other things to be produced on behalf of the defendant.

DATE: July 12, 1994
TIME: 10:00 a.m.
Place: Pike County Courthouse
Things to be Produced: All records relating to Holly Wood (date of birth: 07-04-60).

Person requesting subpoena: Kenneth B. Trotter
Attorney for Defendant
Bell Building
207 Montgomery Street,
Suite 212
Montgomery, AL 36104

DATE: June 29, 1994

/s/ Brenda Peacock
Brenda Peacock
Circuit Clerk

RETURN ON SERVICE

I hereby certify that I personally delivered a copy of this Order to _____ on _____, 1994

/s/ illegible
Signature and title of Process Server

Served by Mail
Date Mailed

/s/ illegible
Signature of Sheriff and/or Deputy Sheriff

Kenneth B. Trotter
Attorney at Law

Bell Building
207 Montgomery St.
Suite 212 Montgomery, AL 36104
(205) 264-0900

October 3, 1994

Mr. Frank Ralph
Cervera & Ralph
P.O. Box 325
Troy, AL 36081

Dear Frank:

I still haven't seen any material from the judge regarding the records we requested from the Alabama Department of Corrections, Parole Board, DHR, etc. Is there anything we can do about this?

If you need any help preparing for trial on October 17, 1994 in Holly Wood's case, please don't hesitate to contact me.

Respectfully,

/s/ Kenneth B. Trotter
Kenneth B. Trotter

LAW OFFICES OF
CERVERA AND RALPH
POST OFFICE BOX 325
TROY, ALABAMA 36081

N.J. CERVERA
FRANK P. RALPH

NINE FOURTEEN BUILDING
914 SOUTH BRUNDIDGE STREET
TELEPHONE: (205) 566-0116
TELECOPIER: (205) 566-4073

October 26, 1994

Mr. Kenneth B. Trotter
Attorney at Law
Suite 212, 207 Montgomery St.
Bell Building
Montgomery, AL 36104

RE: State of Alabama vs. Holly Wood; CC 94-07

Dear Ken:

I received a copy of an Order, dated October 24, 1994, which you have probably also received. The Judge mentions presentation of any arguments concerning the existence of aggravating and mitigating circumstances will be held December 2nd, at 9:00 a.m.

This seems like a re-hash of what has already been done. However, I request that you be prepared to make such arguments as are proper in the circumstances since you handled that phase of this case in chief. If you have any questions, please advise. I am, by copy of this letter, informing Cary Dozier of this suggestion.

Yours very truly,

/s/ Frank Ralph
Frank Ralph

Kenneth B. Trotter
Attorney at Law

Bell Building
207 Montgomery St.
Suite 212 Montgomery, AL 36104
(205) 264-0900

November 23, 1994

Mr. Cary Dozier
P.O. Box 614
Troy, AL 36081

Dear Cary:

Frank Ralph sent me a letter asking me to handle the sentencing hearing on December 2, 1994. I would appreciate yours and Mr. Ralph's help in preparing for this hearing.

Judge Barr stated any psychological evaluations could be presented at the sentencing hearing. We have not had any independent psychological evaluations done since you said it would not be needed. As you know, in discovery material first made available to us at trial from the department of corrections, Holly had anger control problems and demonstrated antisocial behavior prior to his release from prison, but was not given counseling for these problems. Based on this information, we should request an independent psychological evaluation—even if that means asking for a postponement of the sentencing hearing. Perhaps, the failure of the state to reveal this information pursuant to Judge Barr's order of September 2, 1994, could even constitute grounds for a new trial.

Please contact me as soon as possible to plan for the hearing and to make arrangements for an independent psychological evaluation. In addition to my office number, you may reach me at my home number, 270-7833.

Respectfully,

/s/ Kenneth B. Trotter
Kenneth B. Trotter

Kenneth B. Trotter
Attorney at Law

Bell Building
207 Montgomery St.
Suite 212 Montgomery, AL 36104
(205) 264-0900

November 23, 1994

Mr. Frank Ralph
P.O. Box 325
Troy, AL 36081

Dear Frank:

I would appreciate yours and Mr. Dozier's help in preparing for the sentencing hearing.

Judge Barr stated any psychological evaluations could be presented at the sentencing hearing. We have not had any independent psychological evaluations done since Cary said it would not be needed. As you know, in discovery material first made available to us at trial from the department of corrections, Holly had anger control problems and demonstrated antisocial behavior prior to his release from prison, but was not given counseling for these problems. Based on this information, we should request an independent psychological evaluation—even if that means asking for a postponement of the sentencing hearing. Perhaps, the failure of, the state to reveal this information pursuant to Judge Barr's order of September 2, 1994, could even constitute grounds for a new trial.

Please contact me as soon as possible to plan for the hearing and to make arrangements for an inde-

pendent psychological evaluation. In addition to my office number, you may reach me at my home number, 270-7833.

Respectfully,

/s/ Kenneth B. Trotter
Kenneth B. Trotter

IN THE Circuit COURT OF
Pike COUNTY, ALABAMA

CASE NO. CC-94-7

STATE OF ALABAMA,

Plaintiff,

vs.

HOLLY WOOD

Dependent.

MOTION TO WITHDRAW

The undersigned court-appointed attorney for Holly Wood hereby makes known to the Court that he desires to withdraw as the court-appointed attorney because he will be moving out of the State of Alabama and closing his law practice. Wherefore, the undersigned attorney hereby moves the Court for entry of an order permitting him to withdraw as court-appointed attorney and discharging him from any further responsibility as the court—appointed attorney.

Respectfully,

/s/ Kenneth B. Trotter

Kenneth B. Trotter
207 Montgomery St.
Suite 212
Montgomery, AL 36104
205-264-0900

CERTIFICATE OF SERVICE

I hereby certify that I have on this 15th day of December, 1994, served a copy of the foregoing Motion on the District Attorney of Pike County, Alabama by placing a copy of the same in the United States Mail, properly addressed and with First Class postage prepaid.

/s/ Kenneth B. Trotter
Kenneth B. Trotter

IN THE Circuit COURT OF
Pike COUNTY, ALABAMA

CASE NO. CC-94-7

STATE OF ALABAMA,

Plaintiff,

vs.

HOLLY WOOD

Dependent.

ORDER

The court-appointed attorney for the Defendant in the above entitled action, having made known to the Court his desire to withdraw as court-appointed attorney it is hereby

ORDERED, ADJUDGED AND DECREED that Kenneth B. Trotter is hereby permitted to withdraw as court-appointed attorney and he is discharged by the Court from any further responsibility as the court-appointed attorney.

DONE AND ORDERED this 19th day of December, 1994.

/s/ Robert W. Barr
Judge

350

Kenneth B. Trotter
Attorney at Law

Bell Building
207 Montgomery St.
Suite 212 Montgomery, AL 36104
(205) 264-0900

August 16, 1994

Mr. Kevin Doyle
[REDACTED]
Birmingham, AL 35209

Dear Mr. Doyle:

I want to thank you for all your help on Holly Wood's case. The disk with the motions has been a great help. I have been able to file a large number of these motions and the judge has already set a hearing on them for September 2, 1994. I will give you a call closer to the hearing date for any suggestions you might have for oral argument.

I also want to apologize if I have seemed agitated or rude on the phone. I have been stressed out over this case and don't have anyone with whom to discuss the case, including the two other attorneys. Perhaps, I have ventilated too much of my stress on the phone with you. If so, please accept my apology.

Again, thank you for your time and assistance.

Best regards,

/s/ Kenneth B. Trotter
Kenneth B. Trotter

PROFESSIONAL INVESTIGATIONS
P. O. Box 210293
Montgomery, Alabama 36121-0293
[REDACTED]

R. C. (Pete) Taylor
Experienced Professional Investigator

BILLING INVOICE

TO: Carey Dozier

FROM: R.C. Pete Taylor

DATE: August 24, 1994

SUBJECT: Holly Wood Investigation Billing for March 23 through August 3, 1994

3/23/94
telephone discussion of case with you;

4/4/96
telephone call to you;

4/6/94
To Troy; case discussion; review files;

3 hours 94 miles

4/8/94
telephone call to Dept. Forensic Science; telephone call to you re DFS files and reports

1/4 hour

4/15/94
To Troy; pick up case documents from you;
To Dothan; see G. Herring, ABI; re attempt to locate "TC"

5 hours 210 miles

4/20/94
telephone to Pardon & Parole board; locate Holly Wood, make arrangements for interview;

4/21/94
To West Jefferson Prison, Bessemer; interview Holly Wood;

8 1/4 hours 242 miles

4/23/94
dictate report re above;

1 hour

billing invoice August 24, 1994
Holly Wood investigation
Page two

4/28/94
telephone call to you re H.W. interview; telephone to Chief Grady Reaves

1/4 hour

4/29/94
To Troy; take tape to you; see Sheriff, Allen C. Jones, interview Dep. Britt Arthur;

4 hours 100 miles

5/4/94
telephone your office re tapes;

5/19/94
To Troy; deliver tapes to you; case discussion;
To Dothan; interview DFS Dr. Paredes & Investigator Mark Day;

5 hours 220 miles

5/20/94
telephone call from TPD Capt. Brown; telephone call to you;

1/4 hour

5/23/94
To Luverne; interview LPD Chief Cochran, Sgt. Johnson; interview J.P Wood, Susan Wood, Johnnie Pearl Wood;
To Troy; case discussion with you;

8 hours 137 miles

5/24/94
See ABI F. Strength re capability verifying telephone numbers called, time; telephone ABI T. Anderson telephone Al Smith; dictation of interviews of 5/23/94;

1 hour

billing invoice August 24, 1994
Holly Wood investigation
Page three

5/25/94
To Luverne; See Trp. Neal; see Jessee Salter & Frances Salter;
Records check Crenshaw Co. Circuit Clerk's Office re Calvin Salter;
See Johnnie Pearl Wood;
To Troy; interview Cynthia Bean; case discussion with you;

5 1/2 hours 137 miles

5/26/94
To Spring Hill; interview Calvin Salter; with Salter, travel route taken by Salter & H.W. night of shooting; continue interview; case discussion with you;

5 1/2 hours 126 miles

5/31/94

duplicate and review tapes of Salter interview; dictate report of Salter interview;

3 hours

6/1/94
To Troy; meet with D.A. Al Smith, Lt. Fannin, Capt. Brown, Eddie Pennington, Starke Laney; review state's evidence; case discussion with you;

4 1/2 hours 102 miles

6/2/94
report writing, dictation re above;

1/2 hour

6/23/94
To Troy; take above tapes to you; case review and discussion;

2 1/2 hours 100 miles

8/1/94
To Enterprise & New Brocton; attempt to locate "TC" and Douglas; attempt to contact Deputy Petty re ID of "TC" and Douglas;

5 hours 183 miles

8/3/94
To New Brocton; see Deputy Petty re locate and ID "TC" and Douglas; To Troy; your office, case discussion and review;

5 hours 179 miles

TOTALS:

67.5 hours @ $35.00 per hour	$2362.50
1830 miles @ 35 per mile.	640.50
Total time and mileage	$3003.00

Meals;

4/21/94	Bessemer	6.84
5/19/94	Dothan	9.39
5/23/94	Luverne	7.91

5/25/94	Luverne	5.35
5/26/94	Troy	6.26
7/03/94	New Brocton	5.25
Total Meals;		$41.00
Total telephone calls		$16.19
TOTAL DUE THIS INVOICE:		$3060.19

PROFESSIONAL INVESTIGATIONS

P. O. Box 210293
Montgomery, Alabama 36121-0293
[REDACTED]

R. C. (Pete) Taylor
Experienced Professional Investigator

BILLING INVOICE

Telephone Calls,
Holly Wood
Investigation

DATE;	NUMBER	PERSON	AMOUNT
4/04/94	[REDACTED]	Dozier	$ .42
4/03/94	[REDACTED]	DFS	1.56
"	[REDACTED]	Dozier	.23
4/15/94	[REDACTED]	G.HERRING	1.04
4/20/94	[REDACTED]	Dozier	1.25
"	"	"	.50
4/28/94	[REDACTED]	TPD	.42
4/29/94	"	"	.50
5/05/94	[REDACTED]	Dozier	.42
5/16/94	[REDACTED]	TPD	.23
5/17/94	"	"	.99
5/18/94	"	"	.42
5/20/94	"	"	.42
5/20/94	[REDACTED]	Dozier	2.70
5/24/94	[REDACTED]	DA office	.23
5/24/94	[REDACTED]	" Elba	.23
"	[REDACTED]	Dozier	.23
"	"	"	.23
5/25/94	[REDACTED]	Al Smith	.50
"	[REDACTED]	"	.50
"	[REDACTED]	"	.25
"	[REDACTED]	re Paul Allen	.50
"	[REDACTED]	C. Salter	.17

5/26/94	[REDACTED]	Dozier	.75
8/03/94	[REDACTED]	Coffee Co. S.O.	.75
"	[REDACTED]	"	.75
Total telephone calls			$16.19

I certify that this invoice submitted by Professional Investigations for time and expenses incurred in the investigation of the Holly Wood case in the amount of $3060.19 is a true, correct and unpaid bill.

/s/ R.C. Taylor
R.C. Taylor

/s/ August 24 1994
August 24 1994

NOTARIZED:

/s/ illegible

Commission expires 1-29-97

GUEST CHECK 38

WAFFLE HOUSE

THANK YOU!

"GOOD FOOD"

[redacted]

Server _____

Employee _____

Manager _____

BEST AVAILABLE COPY

PROFESSIONAL INVESTIGATIONS

P. O. Box 210293
Montgomery, Alabama 36121-0293
[REDACTED]
(256) not in service

R. C. (Pete) Taylor
Experienced Professional Investigator Billing Invoice

TO: Carey Dozier

FROM: R.C. Pete Taylor

DATE: October 26, 1994

SUBJECT: Billing on Holly Wood Investigation for October 14-19, 1994

10/14/94
Telephone calls with Carey Dozier

1/2 hour

10/16/94
Salter statement & tape review

1 hour

10/17/94.
Court-Troy 7:30 AM-7:00 PM Qualify Jurors

11 1/2 hours 93 miles

10/19/94
Court-Troy 12 Noon-2:30 PM

2 1/2 hours 93 miles

TOTALS:

15 1/2 hours @ $35.00 per hour	$542.50
186 miles @ 35¢ per mile	65.10
Telephone call 10/14/94 to Carey Dozier	5.34
TOTAL DUE;	$612.94

I certify that this invoice submitted by Professional Investigations for time and expenses incurred in the investigation of the Holly Wood case in the amount of $612.94 is a true, correct and unpaid bill.

s/ R.C. Taylor Oct. 26, 1994
R.C. Taylor date

s/ Illegible 10/26/94
Notary Public date

TO: Cary L. Dozier
FROM: R.C. (Pete) Taylor
DATE: 05/24/94
Subject: Holly Wood
RE: Interview of
1. Johnnie Pearl Wood
[REDACTED]
Luverne Alabama 36049

Telephone [REDACTED] home
[REDACTED] work

Johnnie Pearl is commonly known and referred to by her nickname, Neal. She is Holly Wood's sister. She drives a Crenshaw County school bus and also works at McDonalds in Luverne.

May 23, 1994, Johnnie Pearl was interviewed at the residence of her father, J.P. Wood, in Luverne. A. synopsis of the interview is as follows:

In reference to September 1, 1993, Johnnie Pearl had seen Holly Wood around and about town during and throughout the day. Johnnie Pearl stated that On September 1, 1993, after dark, about 7:00 P.M. she had seen Holly Wood near her house walking toward his father's house having said that he was going to get something to eat. Johnnie Pearl stated that he had probably been to the store to get two (2) cold drinks (Referred to in the interview of Susan Wood.)

Johnnie Pearl stated that she was aware of Lois Gosha having made a telephone call during the day of September 1, 1993, to Holly asking for six (6) or seven (7) hundred dollars to be used to pay the rent on the house in Enterprise that she and Holly were planning to rent. Johnnie Pearl was aware that J.P. Wood gave this money to Holly.

Johnnie Pearl stated that at about 9 or 10 P.M. on the night of September 1, 1993, she called her father's residence and talked with Holly Wood. The next time she saw or talked to Holly was later in the night at her father's residence when Holly was arrested.

Johnnie Pearl stated that late in the night of September 1, 1993 she was out driving her car on her way home and decided to drive by her father's residence just to check on things. She stated that as she approached the area of the Piggly Wiggly going toward Joseph Street, the police had all traffic stopped. She said that she was not allowed to go any further and was told by the police that they had her father's house under surveillance and were waiting for a warrant to arrive for Holly's arrest. She said that the police told her that Holly had shot and killed a girl in Troy. They asked her if she knew Lois Gosha and said that was the girl that Holly had killed. Johnnie. Pearl stated that when the Troy police arrived, all the police then went down to her father's residence and she followed them. She said that her father came to the door and told the police that Holly was in the little house (utility house). Johnnie Pearl stated that the police then made entry into the house and arrested Holly. She could hear them talking to him and asking him where was the gun. She could hear them moving about in the house searching for the gun.

Johnnie Pearl stated that as soon as the police went into the little house Calvin Salter walked out unescorted, walked through the yard and stood in front of her father's truck. She said that Calvin just stood there with his hands behind his back and his head down and made no statement nor would talk to

anybody. The police brought Holly out of the little house. He was asking the question "What's going on ? "what's all this about?" and he directing those questions to Calvin Salter. Johnnie Pearl stated that it was at least 30 minutes after the police had left with Holly that they returned and got Calvin Salter and left with him.

Johnnie Pearl stated that 1 or 2 days after Holly's arrest that she and her sister, Susan, were in the Troy Police Department attempting to see Holly. She stated that at this time she was allowed to read what was told to her to be a statement as a hand written statement, written on two yellow legal pages. She said that this statement was given to her by "the D.A man".

At this point in the interview I allowed Johnnie Pearl to see the copy of Salter's statement made to Lieutenant Lewis Fannin. This statement was dated 2 A.M. September 2, 1993. Johnnie Pearl stated that this statement was not the one she had read in the troy Police Department on the visit referred to above. That is the end of this memorandum.

TO: Cary L. Dozier
FROM: R.C. (Pete) Taylor
DATE: 05/24/94
Subject: Holly Wood
RE: Interview of

1.] J.P Wood

2.] Susan Wood Caldwell

[REDACTED]

Luverne, Alabama

Telephone [REDACTED]

The memorandum will read as follows:

J.P. Wood is Holly Wood's father. He is 87 year of age. Susan Wood Caldwell is Holly Wood's sister. She is approximately thirty (30) years of age. At the time of the interview on May 23, 1994, Susan is living with her father J.P. Wood. On September 1, 1993, Susan was living in the Luverne community in an area known as Patsburg.

On May 23, 1994, J.P. Wood and Susan Wood Caldwell were jointly interviewed by me at their residence in Luverne. A synopsis of this interview is as follows:

On September 1, 1993 J.P gave Holly Wood about six hundred ($600.00) dollars to be used to pay the rent on a house in Enterprise that Holly and Lois Gosha were planing to rent. This money was given to Holly in the morning part of the day before noon. Susan was present at her father's residence when this took place.

Susan came back to her father's residence in the afternoon and put some clothes in the washing machine. At that time Holly asked her to go to

Enterprise and help Lois move into the newly rented house. Susan would not or could not go. Susan stated that between the time her father had given Holly this money and this time in the afternoon when Holly asked her to go to Enterprise, that enough time had lapsed that Holly could have gone to Enterprise and returned. She does not no whether he did this or not. Susan then went back to her home. Holly called Susan at her home after dark and asked her if she had cooked supper yet. Susan replied to Holly that she had not cooked supper at that time but would do so shortly. Susan stated in the interview that she never cooked in the daytime. She only cooked after dark.

Susan stated that after cooking supper on September 1, 1993 after dark that she carried two (2) plates of food to her father's house and talked to her father and Holly and left the food. She stated that there were two cold drinks sitting on the table. After leaving the food, Susan left to go somewhere else and after that trip somewhere else she went home. Sometime "way latter on" Susan left home again and went through the housing project section of Luverne called Park Hill. When she passed the residence of another brother, Clemmon Wood, she saw Clemmon and Holly Wood and a bunch of other folks standing in the yard. This was at least one hour or longer after she had brought the food to J.P. and Holly. Later on that night Susan's sister, Johnnie Pearl, called her and said that the police were at her father's house and were arresting Holly Wood.

During this interview J.P. Wood described his single barrel shotgun as follows: (The gun owned by him on September 1, 1993.) A 12 gauge single barrel shot gun, make unknown. The shotgun was secured

inside the cab of the Dodge of his truck by a dog chain approximately 3 feet long being secured around the pistol rip portion of the stock, pad locked, and the other end of the chain pad locked to the frame of the seat. Two locks were used and required two different keys. Both keys were kept on the same key ring with the truck keys. This is the end of the memorandum.

TO: Cary L. Dozier
FROM: R.C. (Pete) Taylor
DATE: 05/19/94
Subject: Holly Wood
RE: Interview of

1.] State Medical Examiner Alfredo Paredes, M.D.

2.] Forensic Investigator—Mark Day--Department of Forensic Sciences, Dothan Satellite Laboratory, Dothan, Alabama.

The memorandum will read as follows:

On page three (3) of the postmortem examination report, Dr. Paredes discusses evidence of minor injury to the body of Gosha. This evidence of minor injury is more specifically defined as several bruises, scrapes and lacerations on various parts of Gosha's left hand.

On May 19, I interviewed Dr. Paredes in his office in Dothan, Alabama. After reviewing his report and refreshing his recollection, Dr. Paredes could not relate these injuries to the left hand to the single blast from a shotgun which caused the death of Gosha. Dr. Paredes stated that, although at the time of his postmortem examination, the bruises, scrapes and lacerations appeared to be of recent origin. He had no explanation for these injuries to the left hand.

In conjunction with the above interview, I also interviewed forensic investigator, Mark Day. Investigator Day made an examination of the evidence and an investigation at the scene of the homicide in Troy, on September 1, 1993. This investigation was made before the body was removed. After reading the postmortem examination and refreshing his recollec-

tion, Investigator Day had no explanation for the injuries to the left hand. Investigator Day could not relate these injuries to the shotgun blast. This is the end.

COURT OF CRIMINAL APPEALS OF ALABAMA.

CR-01-0700

HOLLY WOOD

v.

STATE OF ALABAMA

April 25, 2003
Rehearing Denied May 23, 2003

BASCHAB, Judge.

*1 On October 20, 1994, the appellant, Holly Wood, was convicted of the capital offense of burglary-murder. *See* § 13A-5-40(0(4), Ala.Code 1975. By a vote of 10-2, the jury recommended that he be sentenced to death. On December 9, 1994, the trial court sentenced him to death. This court and the Alabama Supreme Court affirmed the appellant's conviction on direct appeal, *see Wood v. State*, 715 So.2d 812 (Ala.Crim.App.1996), *aff'd*, 715 So.2d 819 (Ala.1998), and the United States Supreme Court denied the appellant's petition for certiorari review, *see Wood v. Alabama*, 525 U.S. 1042, 119 S.Ct. 594, 142 L.Ed.2d 536 (1998). The relevant facts of the case are set forth in this court's opinion on direct appeal. This court issued a certificate of judgment on June 9, 1998.

On December 1, 1999, the appellant, through counsel, filed a Rule 32 petition, challenging his conviction and sentence of death. He filed amended petitions on or about September 15, 2000, and July 2, 2001. The State responded and moved to dismiss many of the

claims. The circuit court dismissed some of the claims and denied some of the claims after conducting an evidentiary hearing. This appeal followed.

After this case was orally argued and submitted, the United States Supreme Court released its decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In *Atkins*, the Supreme Court held:

> "We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."

536 U.S. at 321, 122 S.Ct. at 2252. In his petitions and in his briefs to this court, the appellant argues that he is mentally retarded, that his trial attorneys rendered ineffective assistance because they did not develop and present evidence that he is mentally retarded, and that the application of the death penalty to those who are mentally retarded is unconstitutional. Therefore, we requested that he and the attorney general brief the applicability of *Atkins* to this case. The parties submitted briefs in support of their respective positions, and we considered those briefs in reviewing this case.

In light of the Supreme Court's decision in *Atkins*, we must remand this case to the circuit court to allow that court to determine whether the appellant is mentally retarded and whether his trial attorneys

rendered ineffective assistance by not developing and presenting evidence that he is mentally retarded. Because the appellant raises several arguments that are related to issues that may arise on remand, we address those arguments in this opinion.[1]

I.

The appellant argues that the circuit court erred because, during the evidentiary hearing on his petition, it did not allow him to present expert psychological testimony to support his contentions that he is mentally retarded and that his trial attorneys rendered ineffective assistance during his trial because they did not develop and present evidence that he is mentally retarded.

A.

*2 First, the appellant contends that the circuit court improperly refused to allow Dr. Faye E. Sultan, a clinical psychologist who had examined him, to testify as an expert witness because she was not licensed to practice in Alabama. On August 9, 2001, the State filed a "Motion in Limine to Exclude the Testimony of Dr. Faye Sultan." In that motion, the State argued that Dr. Sultan had not been licensed by the Alabama Board of Examiners in Psychology to practice psychology in the State of Alabama; that Dr. Sultan had practiced as a psychologist in the State of Alabama, as defined in § 34-26-1(b)(1), Ala.Code 1975 because she had conducted testing in the state and had been named to testify as an expert witness in the case by the defense; and that a person who is not licensed in this state and who holds himself or

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[1] At this time, we pretermit discussion of the remaining arguments the appellant raises in his brief.

herself out as a psychologist and practices in this state is guilty of a Class C misdemeanor, as set forth in 4 3426-42, Ala.Code 1975. The next day, the circuit court entered the following order:

> "Having considered the arguments presented by Respondent, the Court hereby ORDERS that Dr. Faye E. Sultan shall be required to establish that she is licensed to practice psychology in the State of Alabama before she will be allowed to testify regarding any psychological issues in this matter which were derived from the administering of tests in Alabama or through an interview with Petitioner, who is detained within the borders of the State of Alabama."

(C.R. 941.) The appellant filed a motion to reconsider, which the circuit court summarily denied. Finally, when this issue was raised at the conclusion of the evidentiary hearing on August 22, 2001, the circuit court explained:

> "But I'm convinced that if I allow Dr. Sultan to testify in this court that I would—as stated in The State's motion, I would be facilitating the commission of a crime myself. I'm not going to do that"

(R. 142-43.)

Initially, we question whether Dr. Sultan actually violated §§ 34-26- 1(b)(1) and 34-26-42, Ala.Code 1975. Section 34-26-1(b)(1), Ala.Code 1975, provides:

> "A person practices as a 'psychologist' within the meaning of this chapter when *he or she holds himself or herself out to be a psychologist or renders to individuals or to the public for remuneration any service involving the applica-*

> *tion of recognized principles, methods, and procedures of the science and profession of psychology*, such as interviewing or administering and interpreting tests of mental abilities, aptitudes, interests, and personality characteristics for such purposes as psychological evaluation or for such purposes as overall personality appraisal or classification, or treatment. The practice of psychologists specifically includes the use of projective assessment techniques, the diagnosis of mental disorders, and psychotherapy."

(Emphasis added.) Because Dr. Sultan evaluated the appellant for his attorneys for use in court proceedings, it is not entirely clear that her actions constituted practicing as a psychologist as defined in this section. Further, § 34-26-42, Ala.Code 1975, provides:

> *3 "If any person holds himself or herself out *to the public* as being engaged in practice as a psychologist or psychological technician, such as clinical, counseling, school, or combined professional-scientific psychology, and does not then possess in full force and virtue a valid license to practice as a psychologist or psychological technician under this chapter, he or she shall be deemed guilty of a Class C misdemeanor and, upon conviction, shall be fined not less than one hundred dollars ($100) nor more than five hundred dollars ($500). Nothing in this chapter shall be construed to limit the professional pursuits of teachers in recognized public and private schools, clergymen, practitioners of medicine, social workers and guidance counselors from full performance of their professional duties. However, in such performance any title shall be in accord with this

> chapter. Students of psychology, psychological interns, or other persons preparing for the profession of psychology may perform as a part of their training the functions specified in this chapter, but only under qualified supervision. Use of psychological techniques by business and industrial organizations for employment placement, evaluation, promotion, or job adjustment of their own officers or employees or by employment agencies for the evaluation of their own clients prior to recommendations for employment is also specifically allowed. However, no industrial or business firm or corporation may sell or offer to the public or to other firms or corporations for remuneration any psychological services as specified in this chapter unless the services are performed or supervised by individuals duly and appropriately licensed under this chapter."

(Emphasis added.) Because it is not entirely clear from the record that Dr. Sultan held "herself out *to the public* as being engaged in practice as a psychologist," we question whether she violated this section.

Moreover, the Alabama Court of Civil Appeals has held that the fact that an expert is not licensed to practice his or her specialty in Alabama does not prevent him or her from testifying as an expert witness in Alabama. In *Mitchell v. Mitchell*, 830 So.2d 755, 757-59 (Ala.Civ.App.2002), the court stated:

> "After reviewing the scant record in this case, we conclude that the dispositive issue presented on appeal is whether the trial court improperly denied the expert testimony of Dr. Sher Schwartz, a psychologist licensed in Georgia, because she was not licensed to practice in Alabama. . . .

". . . .

"The question we must answer is whether a psychologist, licensed in another state, may be prohibited from testifying as an expert witness solely on the grounds that she is not licensed in Alabama.

"Rule 702, Ala. R. Evid., provides:

"'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.'

"'"[W]hether a witness is qualified to testify as an expert on a particular subject is largely within the discretion of the trial court, and that court's judgment on that question will not be disturbed absent an abuse of discretion."' *Knapp v. Wilkins*, 786 So.2d 457, 461 (Ala.2000), quoting *Brown v. Lawrence*, 632 So.2d 462, 464 (Ala. 1994).

"The husband argues in his brief that he objected to Dr. Schwartz's testimony because practicing psychology in Alabama without a license is a crime, pursuant to § 34-26-42. While he is correct that *practicing* psychology without a license is a misdemeanor offense, there is no evidence that Dr. Schwartz was practicing psychology in Alabama. She is licensed in Georgia and has an office in Columbus, Georgia. At the time the child was seeing Dr. Schwartz, the mother and the child lived in Phenix City, Alabama, which is located on the Alabama state line, adjacent

to Columbus, Georgia. "Section 34-26-1(b)(1) provides:

"'A person practices as a "psychologist" within the meaning of this chapter when he or she holds himself or herself out to be a psychologist or renders to individuals or to the public for remuneration any service involving the application of recognized principles, methods, and procedures of the science and profession of psychology, such as interviewing or administering and interpreting tests of mental abilities, aptitudes, interests, and personality characteristics for such purposes as psychological evaluation or for such purposes as overall personality appraisal or classification, or treatment. The practice of psychologists specifically includes the use of projective assessment techniques, the diagnosis of mental disorders, and psychotherapy.'

"We do not conclude from our reading of § 34-261 that the Legislature intended that psychologists be licensed in Alabama as a prerequisite to their giving expert testimony. Rather, we believe the intent of the Legislature in adopting §§ 34-26-1 and 34-26-42—punishing those who practice without a license—is to prevent unqualified persons from performing the functions of a psychologist within this State. Nothing in § 34-26-1 would lead one to conclude that testifying is a function of practicing psychology. Furthermore, if we carried the husband's argument to the extreme, any expert witness whose field of expertise is subject to licensing in Alabama would have to obtain an Alabama license before offering expert testimony. *See Goodwin v. Camp*, 852 S.W.2d 698 (Tex.App.1993) (out-of-state chiro-

> practor who was not licensed in Texas could testify, and his testimony did not constitute the practice of chiropractic medicine, which required a Texas license). *Cf. Coe v. State*, 17 S.W.3d 193 (Tenn. 2000) (out-of-state psychologist's performance of forensic evaluation and testimony in connection with proceeding to determine death-row inmate's competency to be executed did not constitute the practice of psychology so as to require a temporary license under Tennessee law). "The trial court erred in not admitting the testimony of Dr. Schwartz solely on the ground that she was not licensed in Alabama."

(Footnote omitted.)

Years before, in *Federal Mogul Corp. v. Universal Construction Co.*, 376 So.2d 716, 719-22 (Ala. Civ. App. 1979), the court held:

> "Plaintiff first complains that it was improperly denied the opportunity to prove its damages. In essence, the experts were unable to testify as to the extent of damage to the roof and its value in its damaged condition. They were also prohibited from testifying as to specifications for reroofing they had prepared. Plaintiff argues this led to an improper charge to the jury that even if it found Universal and Pearce, DeMoss liable, it could only assess nominal damages against these defendants. "Next, plaintiff complains that the experts were wrongfully denied the opportunity to express opinions as to the quality of the workmanship in installing the roof and as to the suitability of the materials used in the roofing system. It is argued that this led to an erroneous granting of directed verdict in favor of Interstate, Johns-Manville, and Wiley and Wilson.

". . . .

"Turning first to the excluded testimony itself we find the following:

"The experts in question, Carl Cash and David Adler, both testified they were employed by Simpson, Gumpertz and Heger (SG & H), a firm located in Boston, Massachusetts. The Boston firm provides engineering services, preparing structural designs and specifications. It also engages in investigations of structural problems and roofing systems, having investigated numerous cases of roofing and waterproofing systems' failures throughout the country.

"Witness Cash testified he was employed by SG & H as a chemist and has worked in the area of built-up roofing for more than twenty years. He has authored articles and manuals on roofing materials and standards as well as writing on the causes of built-up roofing systems' failures.

"Adler testified he was a senior staff engineer of SG & H with a degree in engineering from Tufts University. He has supervised the installation of several hundred built-up roofing systems throughout his career with various firms. He has been qualified by the National Roofing Contractors Association for a technical assistance program which provides roofing consultants for various projects.

"Cash made five trips to Federal Mogul's plant and after taking sample cuttings from the roof for purposes of analysis, determined it needed replacements. Pursuant to contract with plaintiff he drew up specifications for this purpose.

"The trial judge at first allowed these into evidence, but upon objection by defendants which led to his ascertaining that neither Cash as an individual nor SG & H as a firm were licensed to practice architecture or engineering in the State of Alabama, ordered them expunged from the record. The apparent basis for this was his conclusion that the information Cash gained in inspecting the roof and utilized in preparing the specifications came as a direct result of his engaging in the illegal activity of practicing in Alabama as an architect or engineer without a license.

"We hold it was error to exclude the specifications from the record. At this point we also note that the court further excluded a contract to reroof between plaintiff and Heritage Construction Company, based upon these specifications. The grounds for this were the same, i.e., that the construction firm was not licensed in Alabama. The court ruled the contract was void and unenforceable and therefore incompetent as evidence. Thus, plaintiff was unable to offer any evidence on the cost of replacing the allegedly defective roof.

"As we find the same basic error led to the exclusion of both the specifications and the contract with Heritage, we address both of these issues at this time.

"We observe the appellees raised the illegality of the documents at the trial below and also argue it in brief. Thus, they refer us to representative cases where unlicensed engineers, architects, and real estate brokers, suing to recover for their services rendered, were denied relief due to the

unenforceability of their contracts. *See Southern Metal Treating Co. v. Goodner*, 271 Ala. 510, 125 So.2d 268 (1960).

"The rationale behind these decisions is that such licensing statutes are an exercise of the police power, enacted for regulatory purposes, and designed to protect the public against fraud and imposition. Our cases hold that contracts in contravention of these statutes are void and unenforceable and refuse to allow recovery on grounds of public policy.

"As plaintiff points out, an analysis of these cases reveals a common strand running throughout. All cases where the argument prevailed were litigated between immediate parties to the contract with the defendants therein raising the illegality of the agreement as a defense to the action.

"However, nonparties have not been so successful. Thus, in *Marx v. Lining*, 231 Ala. 445, 165 So. 207 (1936), a vendor utilized interpleader when faced with the conflicting claims of two real estate brokers to the commission on the sale of the vendor's property. One of the brokers asserted the other had no claim to the commission as she was not properly licensed. He reasoned this deficiency rendered the contract between the vendor and the rival broker void and unenforceable.

"Our supreme court answered this by observing that contracts which are void, not because of any intrinsic immorality, but because they offend a statutory policy, may, in some instances, be enforced in a court of law because of the inability

of the party affected to plead their invalidity. In applying this doctrine, the court held that the defense of illegality, although open to the parties and those claiming under them, cannot as a general rule be invoked by third persons.

"We follow that general rule today and hold it was error for the trial court to exclude the specifications and contract on the grounds of illegality. These documents were crucial to plaintiffs case on damages, and their exclusion was instrumental in leading the trial court to its erroneous charge taking the issue of damages away from the jury.

"Plaintiff further complains of the ruling below that neither Cash nor Adler could testify as experts in the field of engineering. However, the trial judge did indicate he would allow them to testify as experts on roofing materials and their installation. "We hold that such a mechanistic application of labels was inappropriate. In so ruling, the court created a distinction impossible of consistent enforcement, the record illustrating that a great deal of testimony within the realm of these men's expertise was erroneously excluded.

"At the outset, we acknowledge that the question of whether a witness offered as an expert is shown to be qualified is within the discretion of the trial court. On review, its decision will not be reversed unless it clearly appears that it was prejudicially erroneous and worked an injury to appellant's cause. *Gregath v. Bates*, Ala.Civ.App., 359 So.2d 404 (1978).

"In holding that such error did occur here, we note that the overall effect of the ruling below is

to require proof of proper licensure as a condition precedent to the giving of expert testimony in the field of engineering. Such a rule does not comport with the practice followed by Alabama courts. Generally, if by training, study, observation, practice, experience, or profession the witness has acquired a knowledge in a particular field beyond that of ordinary laymen, he has earned the appellation 'expert' in that field. *Aetna Life Ins. Co. v. Hare*, 47 Ala.App. 478, 256 So.2d 904 (1972).

"Furthermore, our decisions hold that experience and practical knowledge may qualify one to make technical judgments as readily as formal education. *International Telecommunications Systems v. State*, Ala., 359 So.2d 364 (1978). In *International*, the purported expert's qualifications were attacked on the grounds that he had no engineering degree and little formal training. Our supreme court, through Justice Beatty, noted his practical experience and affirmed the admission of his opinion, indicating any other course would have been improper.

"We also note that the plaintiff did not experience difficulty in introducing Cash and Adler's testimony until the licensure problem erupted. This further buttresses our conclusion that the trial judge improperly equated lack of licensure with lack of expertise and therefore failed to look to the proper yardsticks as developed in our decisional law.

"In view of the above, the witnesses Cash and Adler, obviously educated and experienced in the field of engineering, should have been allowed to state their opinions as to such matters as the

> suitability of the roofing materials, the quality of the workmanship involved, the condition of the roof, and the need for replacement."

Similarly, other jurisdictions have concluded that being licensed in the state in which he or she testifies is not a prerequisite to testimony by an expert witness. *See Hayes v. United States*, 367 F.2d 216, 222 (10th Cir.1966) (noting that "[i]t is well settled that medical experts may be permitted to testify in matters concerning which they are qualified even though they may not be licensed to practice medicine in the jurisdiction involved"); *Paradise Prairie Land Co. v. United States*, 212 F.2d 170, 173 (5th Cir.1954) (holding that "[t]he inquiry by the trial judge as to the qualifications of such a witness should be whether or not the witness possesses the special knowledge and experience to qualify him as an expert, not whether or not he has complied with the state's licensing requirements to practice that profession"); *Teat v. State*, 237 Ga.App. 867, 516 S.E.2d 794, 796 (1999) (holding that "[a] witness need not be licensed to practice psychology in Georgia in order to qualify as an expert in matters of psychology or mental health" in a case that involved testimony by an unlicensed psychologist); *In re: C.W.D.*, 232 Ga.App. 200, 501 S.E.2d 232, 239 (1998) (noting that "[t]he possession of a license in Georgia does not go to qualification as an expert witness but may go to the weight and credibility that a jury gives to such expert's opinion" in a case that involved testimony by a psychologist who was not licensed in Georgia); *Kluck v. Kluck*, 561 N.W.2d 263, 266 (N.D.1997) (holding that "[e]vidence Rule 702 does not require licensure in a particular field, or licensure in the court's jurisdiction, to qualify as an expert" in a case that involved a custody evaluation by a psychologist

who was not licensed in North Dakota); *Fowler v. City of Manassas Dept. of Social Servs.*, (No.. 0878-94-4, January 17, 1995) (Va.Ct.App.1995) (unpublished memorandum) (stating that "[w]e find neither authority nor need for an additional requirement that an otherwise qualified professional called as an expert witness must be licensed to practice in Virginia" in a case that involved testimony by a psychologist who was not licensed in Virginia); *Reutter v. State*, 886 P.2d 1298, 1308 (Alaska Ct.App.1994) (noting that "[t]here is no requirement that a witness possess a particular license or academic degree, provided that the factfinder can receive appreciable help from the witness' testimony"); *People v. Scalera*, 118 A.D.2d 670, 500 N.Y.S.2d 19, 20 (1986) (holding that "the trial court did not abuse its discretion in admitting in evidence the opinion of a physician who was not licensed to practice medicine in New York"); *State v. Walker*, 58 Or.App. 607, 649 P.2d 624, 625 (1982) (holding that "[t]he trial court properly ruled that the psychologist's lack of a license went, at most, to the weight of his testimony, not to its admissibility" in a case that involved testimony by a clinical psychologist who was not licensed in Oregon). *See also Geophysical Sys. Corp. v. Seismograph Serv. Corp.*, 738 F.Supp. 348 (C.D.Ca1.1990); *State v. Belken*, 633 N.W.2d 786 (Iowa 2001); *Coe v. State*, 17 S.W.3d 193 (Tenn.2000); *Commonwealth v. Brown*, 544 Pa. 406, 676 A.2d 1178 (1996); *Yandell v. State*, 262 Ark. 195, 555 S.W:2d 561 (1977); *Ducote v. Allstate Ins. Co.*, 242 So.2d 103 (La.Ct.App.1970).

We adopt the rationale of the Alabama Court of Civil Appeals and the other jurisdictions cited and hold that the fact that an expert is, not licensed to practice his or her specialty in Alabama does not, by

itself, prevent him or her from testifying as an expert witness in a criminal case in Alabama.

Further, we conclude that the fact that practicing psychology without a license is a misdemeanor does not necessarily prevent a witness from being qualified to testify as an expert. In *Hagen v. Swenson*, 306 Minn. 527, 236 N.W.2d 161; 162 (1975), the Minnesota Supreme Court addressed a similar situation as follows:

> "Plaintiff alleges that the trial court improperly allowed expert testimony. Dr. Andrew Leemhuis, a neurologist and psychiatrist, was permitted to interpret plaintiffs Minnesota Multiphasic Personality Inventory (MMPI). Plaintiff argues that such an interpretation is the 'practice of psychology' within the meaning of Minn. St. 148.89, subd. 1. The private practice of psychology without a license is a misdemeanor under § 148.97, subd. 1. We reject plaintiffs contention that these statutes act to prohibit the testimony of Dr. Leemhuis, who is not a licensed psychologist. They are licensing statutes that have no direct application to the qualifications of expert witnesses."

(Footnote omitted.)

Finally, with regard to testimony by experts, Rule 702, Ala. R. Evid., provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

This Rule focuses on the proffered witness' knowledge, skill, experience, training, and/or education rather than any particular licensure by the State.

For these reasons, we conclude that the facts that Dr. Sultan was not licensed to practice psychology in Alabama and that practicing psychology in Alabama without a license is a misdemeanor do not, by themselves, operate to disqualify her from testifying as an expert witness.[2]

> "If we were to adopt [the circuit court's position], we would in effect preclude expert testimony from, for example, Archimedes himself, the Greek mathematician, physicist, and inventor—credited with the discovery of the principle of the lever—had he come to testify in our courts, without first obtaining his license to practice . . . in Rhode Island. Wernher von Braun, the father of our national space program, absent a Rhode Island license, would also fall into that category of ineligibility. We do not believe that our Legislature intended that persons of great learning . . . should be barred from testifying in our courts, and assisting the triers of fact, merely because they have not been licensed here in their respective fields of expertise."

Owens v. Payless Cashways, Inc., 670 A.2d 1240, 1244 (R.I.1996). Therefore, the circuit court erred when it refused to allow Dr. Sultan to testify as an expert in this case on the grounds that she was not licensed to practice psychology in Alabama and that

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[2] A court should evaluate a proffered expert witness' qualifications based on the standard set forth in Rule 702, Ala. R. Evid.

practicing psychology in Alabama without a license is a misdemeanor.

B.

Second, the appellant contends that the circuit court abused its discretion when it used a bifurcated approach to determine whether he should be allowed to present expert psychological testimony. After the circuit court refused to allow Dr. Sultan to testify, the appellant asked to be allowed to present psychological evidence in support of his petition. After some discussion, the circuit court ordered, at the State's suggestion, that the parties submit briefs on the issue of whether the appellant had established that his trial attorneys' performance had been deficient. Subsequently, it concluded that the appellant had not established that his trial attorneys' performance had been deficient and denied his request to obtain and present psychological evidence in support of his petition.

We conclude that, under the facts of this case, the circuit court erred in using such an approach. The appellant did more than simply make bare allegations that his attorneys rendered ineffective assistance by not developing and presenting evidence that he was mentally retarded. In fact, he supported his contention with evidence, including an "Outpatient Forensic Evaluation Report" that showed that, in a 1992 evaluation, "he produced an IQ in the borderline range of intellectual functioning" and a letter in which one of his trial attorneys recommended that they request an independent psychological evaluation for purposes of the sentencing hearing before the trial court. (C.R. 14-15.) However, he still needed to be able to present expert psychological testimony to establish that his attorneys' performance was defi-

cient. Therefore, the bifurcated approach the circuit court used was not appropriate under the specific facts of this case. On remand, the circuit court should allow the appellant to present psychological evidence in support of his argument that his trial attorneys rendered ineffective assistance because they did not develop and present evidence that he is mentally retarded.

II.

The appellant also argues that the circuit court improperly concluded that he is not mentally retarded. In the portion of its order in which it addressed the appellant's argument that his trial attorneys rendered ineffective assistance because they did not develop and present evidence that he is mentally retarded, the circuit court stated: "The Court finds that, based on the evidence available, [the appellant] is not mentally retarded." (Supp.C.R. 65.) For the reasons set forth herein, the circuit court did not have sufficient information before it to make such a finding. On remand, the circuit court shall address this contention only after allowing both parties to submit evidence in support of their respective positions and in compliance with this opinion. In determining whether or not the appellant is mentally retarded, the circuit court should consider the standard set forth in *Ex parte Smith*. [Ms. 1010267, March 14, 2003] __ So.2d (Ala.2003); *Ex parte Perkins*, 851 So.2d 453 (Ala.2002); and *Stallworth v. State*, [Ms. CR-98-0366, January 31, 2003] So.2d (Ala.Crim.App.2003) (opinion on return to second remand).

Accordingly, we remand this case to the circuit court with instructions that that court conduct an evidentiary hearing on and make specific, written

findings of fact as to the appellant's contentions that he is mentally retarded and that his trial attorneys rendered ineffective assistance because they did not develop and present evidence that he is mentally retarded. On remand, the circuit court shall take all necessary action to see that the circuit clerk makes due return to this court at the earliest possible time and within 70 days after the release of this opinion. The return to remand shall include the circuit court's specific, written findings of fact and a transcript of the evidentiary hearing.

REMANDED WITH INSTRUCTIONS.

WISE, J., concurs; SHAW, J., concurs in the result, with opinion, which McMILLAN, P.J., and COBB, J., join.

SHAW, Judge, concurring in the result. I concur in the result only.

Although I would rather remand this case for an *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), hearing after the Legislature has addressed and determined this State's policy on this matter and established procedures and standards for determining whether a capital defendant is mentally retarded and, therefore, not subject to the death penalty, I nonetheless concur to do so to allow the circuit court to conduct an evidentiary hearing and to make additional findings of fact as to whether the appellant is, in fact, mentally retarded under the standards recently discussed in *Ex parte Smith*, [Ms. 1010267, March 14, 2003] __ So.2d (Ala.2003); *Ex parte Perkins*, 851 So.2d 453 (Ala.2002); and *Stallworth v. State*, [Ms. CR-98-0366, January 31, 2003] So.2d __ (Ala.Crim.App.2003) (opinion on return to second remand). I am aware that legislation addressing this

matter has been proposed in the current legislative session, and I join the Alabama Supreme Court in urging the Legislature to develop procedures and standards expeditiously for determining whether a capital defendant is mentally retarded. *See Ex parte Perkins*, 851 So.2d at 455 n. 1.

McMILLAN, P.J., and COBB, J., concur.

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[21] regard, also, as to the State.

MR. JOHNSON: Your Honor, before I begin direct examination, I just want this Court to take judicial notice of the police records pertaining to Ms. Everage's testimony. They're actually in the trial record; therefore, I don't see any need to admit them into evidence at this time. They're Pages 408 to 415, I believe, of the trial record. So just take judicial notice of that.

CALISTA EVERAGE

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Could you please state your name for the record?
A. Calista Everage.
Q. Are you currently employed?
A. Yes, sir.
Q. Where are you currently employed?
A. City of Troy Police Department.
Q. What is your rank or job title there?
A. Detective sergeant.
Q. How long have you been employed in that police department?
A. Since 1980—April of '80.
Q. [22] Have you been employed as a detective sergeant the entire time?
A. No, sir, I haven't.
Q. What were your prior ranks and designations?
A. I was a jailer, dispatcher, patrol officer, and then a detective.
Q. Directing your attention to September 17th of 1991, do you recall if you were on duty that day?
A. Yes, sir.
Q. What was your job assignment that day?

A. Routine patrol.

Q. Do you recall an incident—stepping back a second, what does that involve?

A. Answering calls that are dispatched, working traffic, whatever comes up to do.

Q. Do you recall an incident that day that occurred around 8:17 p.m. that evening?

A. Yes, sir.

Q. Where did that incident occur?

A. On Stringer Street right off of Saint Paul Street.

Q. What city was that in?

A. Troy.

Q. Please tell this Court what happened with respect to that incident.

A. [23] I was on the—I was on Saint Paul Street running radar. A vehicle came through my radar over the speed limit. I stopped this vehicle on Stringer Street and approached it to give him a ticket for speeding.

Q. Can you tell us who was in the vehicle when you stopped the car?

A. Holly Wood.

Q. Can you describe Holly Wood's demeanor when you stopped the vehicle?

A. Seemed very nervous. I asked him for a driver's license. He fumbled around to his right in the front seat of the truck. He was driving a pickup. He eventually handed me a license that did not belong to him. I asked him to step out of the truck. I called for backup, and I waited for my backup until I did anything further.

Q. Was Holly Wood coherent at that point?

A. Yes.

Q. Would you say he was intoxicated?

A. No, sir. I don't remember him being intoxicated.

Q. So how were you able to determine that the ID card was, in fact, fake?

A. His face wasn't the face on the card.

Q. [24] Did Holly Wood appear to act deliberately at that point?

A. I think he deliberately gave me a driver's license that was not his.

Q. When you determined that his face was not the face on the card, what did you do?

A. I called for backup. He had already made me nervous by plundering around in the front seat of the truck or beside him in the truck. And I called for backup and waited. And during that is when he fled.

Q. Was there anyone else in the vehicle at the time?

A. No, there wasn't.

Q. When you got him out of the vehicle and you determined that the ID was not matching his face, did you know who that individual was?

A. You know, I've tried to go back in my mind to determine if I knew that it was not him because I knew Holly Wood or because—you know, I don't know that I knew I had Holly Wood in the truck. I can't tell you from eleven, twelve years ago for sure. And it may not have been that I recognized him until he came to pick up the truck. I don't remember which circumstance.

Q. When he showed you that ID card, did you [25] engage in a discussion with him?

A. I told him—you know, I confronted him about it not being him.

Q. Did he attempt to explain the discrepancy?

A. He kept telling me it was his; it was his driver's license.

Q. And at that point, what did you do again?

A. He ran.

Q. How did he run?

A. He just—

Q. Where exactly was he positioned?

A. He was up against the side of the truck with his hands on the truck and his feet spread.

Q. So he was not in handcuffs?

A. No, he was not at that time.

Q. Where were you at that time?

A. I was behind him, standing behind him.

Q. And so at that point, he fled?

A. He fled.

Q. How exactly did he flee? What exactly occurred at that point?

A. He was standing there one second. The next second, he was running behind me. His shoes were still right where his feet had been when I placed him on the side of the truck. He took off this way over [26] my left shoulder and ran up through the woods.

Q. Do you recall where he went exactly?

A. He went—he was on Stringer Street. He went up toward what would be Michner and Mulberry, up to that part of town. I never caught him, so I don't know where he went.

Q. After he fled, what did you do?

A. I alerted other units that he had ran. I probably gave them a clothing description. If I knew who he was at that time, I told them who we were hunting. And I honestly do not remember if I knew or not, so I can't sit here and say for sure that I knew.

Q. Do you know the ultimate disposition of that case?

A. I believe the escape was nol pros'd. And I don't know the disposition of the speeding and the criminal impersonation.

Q. When was the next time you or your police department encountered Holly Wood?

A. I believe he came the next day to pick up the truck that he was on.

Q. And at that time, what occurred?

A. He was arrested.

Q. Are you aware if there was any conviction in this case?

A. [27] No, sir, I don't. I assume there was in the speeding and the criminal impersonation. But I don't know that for a fact, no.

MR. JOHNSON: At this time, I pass the witness.

CROSS EXAMINATION

BY MR. HOWLEY:

Q. Can you describe the person whose photo appeared on the identification card that Mr. Wood gave you?

A. No, sir, I can't.

Q. What type of identification card was it?

A. I believe it was a driver's license, if I remember correctly.

Q. And how long did it take you to realize that the photo on the card was not Holly Wood's photo?

A. A very short period of time. Just looking at him and looking at the picture, it wasn't the same man.

Q. Was it fairly obvious to you that the picture was not the person you were looking at?

A. I don't remember how obvious it was.

Q. Can you walk me through the chain of events that happened? You asked for his license; right?

A. (Witness nods.)

Q. [28] And then he gives you a license that isn't his; is that right?

A. Basically, yes.

Q. And then you ask him to get out of the truck when you find out that the license isn't his? Is that what happens next?

A. Yes, sir. I would say yes. I don't remember if it was—how it happened chronologically. I know that I walked up to him and asked for a driver's license. He fumbled around over here in the dark for, you know, seemed like a long time if you're standing there waiting. And he handed me those license. And I believe that's when I asked him to step out of the truck.

Q. And at some point, you confronted him with the fact that the license wasn't his; is that right?

A. Yes, sir.

Q. And at the time you confronted him, was he up against the truck?

A. I don't remember.

Q. Did he say anything to you when you confronted him?

A. I know that he kept telling me, you know, that those were his license. But other than that, I don't remember anything that he said.

Q. [29] So the only thing you remember him saying is that it was his license?

A. Yes, sir.

Q. And when you had him up against the truck, I think you said you didn't put handcuffs on him; is that right?

A. No, sir, I didn't. I didn't want to be standing there by myself trying to put handcuffs on him when he already had me worried about his intentions. I was concerned about my safety, so I had him sitting there—standing there—leaning there waiting for somebody before I actually put my hands on him and he resisted or whatever he might do. I wanted help to be there before I started that procedure.

Q. Did you have your hand on your gun?

A. I don't remember.

Q. Did you pull your gun?

A. I don't believe so. I don't know of any need I would have had to pulled my gun.

Q. After you got him out of the truck and you put him against the truck, did you say anything else to him?

A. I don't remember.

Q. So the two of you just stood there in silence?

A. [30] I don't remember that honestly. I mean, this is 1991. I can't tell you if we had a conversation.

Q. And at some point, he ran?

A. Yes, sir.

Q. Now, I couldn't hear well. Did you say something about his shoes?

A. Yes, sir.

Q. What happened with his shoes?

A. When he left where I was, his shoes were still sitting just like they were when his feet were in them. That's how quick he came out of his shoes.

Q. And he ran away barefoot?

A. He did.

Q. When he came in the next day to pick up his truck, did he identify himself?

A. I would say yes, by us serving a warrant on him, you know. I would feel like he was identified by us serving a warrant and arresting him and putting him in jail.

Q. Well, let me see if I understand this. Did he come in on his own the next day to ask for his truck?

A. I believe so. He came to pick up the truck.

Q. And were you there when he showed up?

A. [31] I don't remember that. I know that I had a conversation with him when he came to pick up his truck or when he was arrested because he kept telling

me, you know, that I had the wrong man. But other than that, I can't—

Q. So the next day when he came by to pick up his truck, he was still insisting that the license was him?

A. I don't know that he was insisting that the license was him. He just said I had the wrong man. He kept telling me you've got the wrong man.

Q. And at this point, you're arresting him when he's saying this?

A. Yes, sir.

Q. So he's denying to you at that point that he's the guy from the night before?

A. That's right.

MR. HOWLEY: I have nothing else from this witness, Your Honor.

MR. JOHNSON: Your Honor, I just have two questions on redirect.

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Ms. Everage, is the Holly Wood from that incident seated in this courtroom today?

A. [32] Yes, sir.

Q. Could you point out where he's seated?

A. Well, now, let me take that back. I assume that's him. I can't tell you for sure that that's him because he's gained a lot of weight and aged and looks different. You know, I assume that's him just because he's sitting at that table.

Q. Okay. Thank you. One more thing. Did you engage in an argument with Mr. Holly Wood about the license after you stopped him?

A. I don't know that I would call it an argument. It was just that, you know, I knew that it wasn't him and he wanted me to believe it was.

Q. How long did that incident occur to the best of your recollection?

A. Not long at all.

MR. JOHNSON: Thank you.

MR. MILLS: Your Honor, at this time, the petitioner would call Ms. Hilda Maddox.

HILDA MADDOX

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. MILLS:

Q. Good morning, Ms. Maddox. Would you please state your full name?

A. [33] Hilda Lee Maddox.

Q. Could you please trace your educational background starting with college?

A. I graduated from Auburn University. I went back to AUM, got state board of education certification in special ed., social science, English, home ec.

Q What were the requirements to become certified in special education?

A. There were so many hours of special education courses that you had to take as well as just education courses that all teachers are required to take.

Q. Upon your certification, did you begin teaching at Luverne High School?

A. Yes.

Q. What year did you begin teaching at Luverne?

A. '71—'71, '72.

Q. And how long did you teach at Luverne?

A. Thirty-one years.

Q. Have you retired recently?

A. Yes. May, 2002.

Q. And what classes did you teach at Luverne?

A. For about the first twelve or fifteen, special ed. with a few regular classes along the way. [34] And then the last ten, twelve, thirteen years, strictly, quote, regular classes.

Q. Do you know Holly Wood?

A. Yes.

Q. How do you know Holly?

A. I taught Holly B. when I was teaching special ed. in the seventies.

Q. So he was a student in your special education class?

A. Yes.

Q. Is there any particular reason why you remember Holly?

A. In the seventies, it was—African American males wore afros. Holly B. had a big afro.

Q. Do you recall what grade you started teaching Holly?

A. Ninth or tenth.

Q. What were the criteria of placing a student in special education at the time that you taught Mr. Wood?

A. They were given an IQ test by a psychometrist. We did not have anyone in the system—Crenshaw County System then that gave them. So they were referred by their teachers. They were given IQ tests. And after they were placed in special ed., [35] we, the teachers, gave them achievement tests along the way.

Q. Were all the students given IQ tests, or was it just students who were not performing?

A. Students that were not performing and might be referred. Just because you took the test didn't necessarily mean that you would get—or be placed in special ed.

Q. And achievement testing was done as well?

A. Right. We, the teachers, did that.

Q. What did that entail?

A. Something similar to the Vineland would be given.

Q. Was there a classification system for special education students from the time Holly was in school?

A. Yes. It was—now, we're talking about the scores themselves?

Q. Yeah. Was there any different ways—besides IQ, was there ways that students were classified within special education?

A. Back then, there were only basically two classifications; educable mentally retarded, trainable mentally retarded. All the others have come along after the early seventies as far as classifications.

Q. [36] So it's fair to say that the students in special education were classified as either educable mentally retarded or trainable mentally retarded?

A. Yes.

Q. Do you recall how Holly was classified?

A. Holly was EMR.

Q. Educable mentally retarded?

A. (Witness nods.)

Q. Do you recall approximately what Holly's IQ was at that time?

A. I'm guessing thinking low to mid 60s.

Q. Among the students classified as educable mentally retarded, how did Holly rank among that group of students?

A. Probably in the middle range. We had some lower and had some higher in abilities and that sort of thing.

Q. So he was in the middle range—

A. Right.

Q. —of the students in special education?

A. Yes.

Q. In special education, do you recall what Holly's grades were approximately?

A. I would feel like C range.

Q. Could you say approximately what percentage [37] of the entire student population at the time you were teaching was classified as special education?

A. Maybe 5 percent or so.

Q. So the bottom 5 percent of the students?

A. Yes.

Q. Now, the special education classes themselves, how were they structured? Was it a structured environment?

A. Yes, it was a structured environment. We were, quote, self-contained back then. The students worked at their own ability levels within the classroom. You tailored the work to them.

Q. Were assignments closely monitored?

A. Yes.

Q. Why was structure imposed?

A. They do better in that type of environment. They are, I think, more secure in an environment that is structured where they can succeed.

Q. So is it fair to say that the structure would be imposed to try to maximize their performance?

A. Please repeat.

Q. Is it fair to say that the structure was imposed in an effort to maximize the special education students' performance?

A. Yes.

Q. [38] Were you contacted by any representatives of the State in connection with this proceeding?

A. Yes.

Q. Do you recall who contacted you?

A. (Indicating).

Q. Are you pointing to Mr. Johnson?

A. Yes.

Q. And did Mr. Johnson ask you to respond to a Vineland questionnaire?

A. Yes.

THE COURT: To a what?

MR. MILLS: Vineland.

Q. Did you fill out the Vineland questionnaire?

A. Yes.

MR. MILLS: Your Honor, may I approach the witness?

THE COURT: You may.

Q. I'm showing you what's marked as Petitioner's Exhibit 17. Is this the Vineland questionnaire that you filled out?

A. Yes.

MR. MILLS: Your Honor, we would ask that Petitioner's 17 be moved into evidence.

MR. JOHNSON: No objection, Your Honor.

THE COURT: Admitted.

Q. [39] Were any of Holly's other siblings in special education when you were teaching?

A. I had Maeola.

Q. Maeola Wood?

A. Uh-huh.

Q. And were you her teacher as well?

A. Yes.

Q. At any time back in 1994, did an investigator named Pete Taylor ever contact you to discuss Holly's case?

A. No.

Q. Had the investigator contacted you in 1994, would you have spoken with him?

A. Yes.

Q. Did any of Holly's attorneys contact you in 1994 to talk about his case?

A. No.

Q. Cary Dozier?

A. (Witness shakes head.)

Q. Frank Ralph?

A. (Witness shakes head.)

Q. Kenneth Trotter?

A. (Witness shakes head.)

Q. Had they contacted you at that time, would you have agreed to speak with them?

A. [40] Yes.

MR. MILLS: No further questions at this time.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. Ms. Maddox, my name Henry Johnson. I'm with the State of Alabama. I have a few questions for you.

At Luverne High School, did you teach a certain class or group of students in particular?

A. In special ed.?

Q. With respect to the entire student body population.

A. Several years, I just taught strictly special ed. Later on, because of the size of the school and number of faculty members, I would teach one, quote, regular class along with the special ed. classes.

Q. You testified that the students in special education were self-contained?

A. Yes.

Q. How many students were in that program in a given year approximately?

A. Back then we had as many as maybe thirty or thirty-five in the senior high classes.

Q. [41] How many teachers did those students have per year?

A. Three.

Q. Do you remember the names of some of the other teachers at that time who taught special education?

A. Gary Spurlan, Mr. Murry Carter.

Q. You've testified that there was a distinction between EMR and TMR. But could you tell us what the typical IQ range of the students in special education was at that time?

A. Probably low 50s to upper 70s. Might even have been at some point 80.

Q. So in general terms, what would a student have to do to qualify for special education at that time?

A. Probably they would be behind in regular classes, have difficulty; and then that teacher would refer them. And we had a process of, like I said, testing that was done by a psychometrist to determine if they qualified for the program.

Q. So is it possible at that time that someone with an IQ of 80 or 85 could have qualified for special education?

A. Not 85.

Q. [42] How about 80?

A. A chance.

Q. How about 75?

A. That would be one of the upper ranges if they did.

Q. Ms. Maddox, what subject or subjects did you teach the special education students?

A. We taught them English, math. They had a vocational shop. We had an area where even the boys learned basic skills like cooking and sewing and that sort of thing.

Q. If you know, the qualifications to get into special education, were they more focused on a student's

IQ and academic performance than on adaptive functioning?

A. Probably about equally.

Q. So would you say that before a student got into special education, somebody somewhere looked at that student's adaptive behavior or adaptive functioning?

A. Yes.

Q. What sort of assignments did you give your special education students?

A. We had basic English skills, basic math skills. We learned how to fill out applications for [43] jobs, fill out applications for other necessary things that they might need.

Q. Were your students given homework on a regular basis?

A. Occasionally.

Q. What type of homework would that be?

A. Worksheets. That sort of thing. Nothing really hard, but occasionally we did.

Q. What would the difficulty level of that homework be in terms of maybe grade level?

A. It would be geared to the student.

Q. So different students—

A. Different students would have approximately the same type homework, but would not have the same homework.

Q. Could you tell us about the grading system for these students?

A. We used the same grading system as regular students; A, B, C, D.

Q. Based on your best recollection, did some or any of your students fail?

A. Yes, we had some that would fail.

Q. Why would they fail, or what would cause a student of yours to fail?

A. They would not do their—would not do [44] their work, would not conform to what we expected of them.

Q. Okay. Let's turn to Holly Wood. Based on your best recollection, did he fail your class—ever fail?

A. No.

Q. Did Holly Wood attend class on a regular basis?

A. Pretty much.

Q. Was he often tardy?

A. I cannot remember.

Q. What about his appearance? How would he look in your class?

A. Very clean; very neat.

Q. Do you recall anything in particular about his grooming?

A. He was just always very neat and very clean.

Q. Do you recall any bad smells?

A. No.

Q. Were his clothes typically dirty?

A. No.

Q. Did he complete his assignments and homework that you would give to him?

A. Sometimes.

Q. What sort of assignments specifically [45] focused on Holly Wood would he receive on a regular basis? Was he asked to write papers?

A. No.

Q. Was he asked to complete basic chores like filling out worksheets?

A. Yes, we did fill out worksheets.

Q. And he would complete those?

A. Yes. He could.

Q. Could you discuss the quality of Holly Wood's work to the best of your memory?

A. He would do and try a lot of the times to finish and do his work.

Q. I know this was a long time ago. But generally speaking, how would you characterize him as a student?

A. He was quiet.

Q. Would you characterize him as lazy?

A. Sometimes.

Q. Would you say that he didn't necessarily put forth the effort that other students might put forth?

A. Sometimes.

Q. Do you think he could have excelled more had he applied himself better?

A. I think Holly—for the most part, Holly B. did basically what he could.

Q. [46] Do you remember if he was usually attentive in class?

A. A lot of the time. But, now, you must remember that these students' attention span is nowhere near ours or regular students. So he would—

Q. Was he able to follow your instructions?

A. Yes.

Q. Complete his tasks?

A. Yes.

Q. How did he get along with the other students in his class?

A. Well.

Q. Did he fight with them often?

A. No.

Q. Was he more of a loner, or was he more popular?

A. He had friends. He just was not real loud. Holly B. was quiet.

Q. Based on your own personal knowledge, do you know how Holly Wood traveled to and from school?

A. Bus probably.

Q. Can you recall anything about any hobbies he would have had?

A. No.

Q. Do you know if he was interested in cars?

A. [47] No.

Q. Do you know if he was employed while he was a student in your class?

A. I cannot remember.

Q. Do you remember if many or any of your students were employed?

A. Some were.

MR. JOHNSON: No further questions at this time.

REDIRECT EXAMINATION

BY MR. MILLS:

Q. You testified that it was possible that a student placed in special education could have an IQ of 75. That that would be the upper range; right?

A. Right.

Q. But Holly was not in that upper range, was he?

A. No. I'm thinking Holly B. was in the low to mid 60 range.

Q. You also said that Holly didn't fail any time in your classroom; right?

A. Right.

Q. But in comparison to other students, you testified that he was average in special education?

A. Right.

[48] Q. What was Holly's age approximately at the time you began teaching him?

A. Fifteen or sixteen.

MR. MILLS: No further questions.

MR. JOHNSON: Your Honor, I have just two questions on recross.

RECROSS EXAMINATION

BY MR. JOHNSON:

Q. Do you have any records pertaining to Holly Wood's school or academic record in your possession?

A. No.

Q. Do you remember exactly what his IQ score was?

A. No.

MR. JOHNSON: Thank you.

(A short recess was had in the proceeding.)

MR. JOHNSON: Your Honor, something came to our attention. One of our witnesses, Melvin Wright, has to be out of here by 1:45, so I just wanted to see if this Court would be willing at some point, not now, but maybe within the next couple of witnesses to put him on just to —

THE COURT: Sure. Anything y'all—

MR. HAYDEN: Right after this one is fine. That's perfect. Thank you.

MS. HODKINSON: [49] Your Honor, the petitioner calls Ms. Janet Penn.

JANET PENN

was sworn and testified as follows:

DIRECT EXAMINATION

BY MS. HODKINSON:

Q. Can you please state your name?

A. Janet Penn.

Q. And can you tell us about your education starting with college?

A. I have a BS from Troy State University in art education with a minor in biology. And I have my master's degree in special education with an endorsement in mental retardation.

Q. Can you tell me what endorsement in mental retardation means?

A. It means that you can teach classes for EMR, TMR; educable mentally retarded, trainable mentally retarded.

Q. How would you define educable mentally retarded?

A. Well, there used to be an IQ breakdown for that, which was—I'm not sure of the bottom range, maybe 60, 65 to 80 when I first started. But since then it's change. I know it's dropped.

Q. [50] Did you ever teach special education?

A. Yes.

Q. When?

A. I began teaching special ed. when I first started 1969, '70. And I taught it until about four years ago.

Q. And where did you teach special ed.?

A. I taught special ed. at Luverne High School.

Q. And at Luverne High School, how would a student get to be enrolled in special ed.?

A. The procedures changed through the years because I taught it for—

Q. Say in the 1970s.

A. Okay. I think maybe the teachers put the name on a list. And they were tested by a psychometrist.

Q. What teachers?

A. Their regular teachers—regular classroom teachers.

Q. What would that be based on?

A. School performance.

Q. Do you know Holly Wood?

A. Yes.

Q. And how do you know him?

A. He was in my class.

Q. [51] And how old was he when he was in your class?

A. He could have been as young as twelve. But probably maybe twelve, thirteen, fourteen, somewhere in that range—the junior high range.

Q. And how many students were in your special ed class when he was enrolled?

A. I had no more than fifteen, and I couldn't tell you how many I had when he was in there.

Q. Do you know how he in particular was placed in special ed.?

A. No, I do not.

Q. Do you know Holly's IQ score at the time he was enrolled?

A. Yes, I knew it at the time.

Q. Do you recall that now?

A. No, I don't.

Q. How would you characterize Holly in comparison to the rest of the special ed. students in your class?

A. He was not at the upper end.

Q. Was he in the lower end?

A. I don't think he was at the very low end, but maybe somewhere middle to low.

Q. Why would you say that?

A. [52] That's just based on my recollection. I tend to remember the ones that could function higher. I know I had them in groups, and I know he wasn't in the higher group as far as math and reading.

Q. And did you ever administer intelligence tests to Holly or achievement tests?

A. Achievement tests, yes.

Q. Which tests did you administer to him?

A. Probably the Wide Range Achievement Test, and maybe it was the Peabody. We called it the Peaot (phon.)

Q. And do you recall those results?

A. No, I don't.

Q. What was the highest score a student in your class would generally score?

A. Usually no higher than sixth grade level. That would be extremely high. Fourth, fifth and sixth would be extremely high. Usually first, second and third grade level.

Q. Can you describe the structure of the special ed. class at the time Holly was enrolled?

A. It was mostly self-contained. I believe they had PE with the regular students. I'm not sure if he had a regular homeroom at that time.

Q. Were there generally rigid instructions for [53] the students to follow?

A. Generally, I guess.

Q. Was the class structured and specifically designed for students with mental retardation to function well?

A. Yes.

Q. How so?

A. We had—like I said, I put them in groups and gave them work that they could achieve in. We played a lot of games and things that would try to build their self-esteem so they'd feel comfortable.

Q. When was the last time you saw Holly?

A. The last time I testified here.

Q. And how about before that?

A. Before that, it would have probably been when he was still in school.

Q. Do you know if Holly—any of Holly's relatives were in special ed.?

A. Yes, I think they were.

Q. Can you tell us who?

A. I believe Maeola, Wesley --

Q. And who's Wesley?

A. Wesley Wood.

Q. And do you know how he's related to Mr. Wood?

A. [54] I believe Wesley would be Holly's nephew.

Q. And was he in your class as well?

A. Yes.

Q. I'd like to show you what's marked as Petitioner's Exhibit 18. Can you tell me what this is?

A. It's the Vineland. It's a measure of social skills and communicative skills and things like that.

Q. Did you fill this form out?

A. Yes, I did.

Q. And who asked you to fill that out?

A. The gentleman in the back with the dark hair. I can't remember his name.

Q. And when was that?

A. About two weeks ago.

Q. And is this a true and correct copy of the --

A. Well, I would have to get it and examine it. Do you want me to look at it again? It's hard to say from the Xs, but it probably is.

Q. Excuse me?

A. I said it's hard to say just from an X, but it looks like mine.

MS. HODKINSON: I'd like to move this into evidence as Exhibit 18.

THE COURT: [55] Admitted.

Q. Ms. Penn, were you living in Luverne in 1994?

A. Yes.

Q. And at that time, did anyone contact you about Mr. Wood?

A. No.

Q. You never met with or spoke with Pete Taylor, Cary Dozier, or Ken Trotter?

A. No.

Q. If asked at that time, would you have testified on his behalf?

A. Yes.

Q. Had you been asked these same questions in 1994, would your answers have been the same?

A. Probably. I might have even remembered a little more ten years ago.

MS. HODKINSON: No further questions.

MR. JOHNSON: Your Honor, for the record, we'd just state that the witness indicated Dr. Gregory A. Prichard, the dark haired man in the back of the courtroom.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. Ms. Penn, my name is Henry Johnson. I'm [56] from the State of Alabama. I have some questions for you. You taught at Luverne High School; is that correct?

A. Yes.

Q. Did you teach special education students only, or did you teach a mix of students?

A. I taught special education students only all of the day except for one class, and I had a regular art class. And in my art class, I have had special ed. students also.

Q. Do you remember names of other special ed. teachers at that time?

A. Ms. Hilda Maddox, Joan Beard, Ms. Gina Williams, Margaret Church, Flora Freeman.

Q. How many students would the special education teachers have in a given year? Were they assigned to one teacher?

A. Yes. But then if they went to PE, of course, that would be another teacher. And they usually had ag. or home ec. And that would be another, so three.

Q. What subjects did you teach to special education students?

A. Reading, spelling, science, math, social [57] studies.

Q. What sort of assignments would you give those students?

A. Its hard to remember back that far. Probably oral reading and comprehension type questions. Spelling. They did a lot of repetitive work. Spelling tests. I tried to have games that went along with a lot of their things, too.

Q. Were they given homework on a regular basis?

A. Not much.

Q. Were they ever given homework?

A. I'm sure they were.

Q. What was the grading system for those students?

A. I gave them regular grades.

Q. Based on your best recollection, did any of your students ever fail special education class?

A. They probably did.

Q. Do you recall if Holly Wood ever failed your class?

A. I don't think so. If they did, it was because they just didn't do the work, didn't put any effort.

Q. Focussing in on the special education program itself, what was the range of IQs in that [58] program?

A. Like I said, it started out with an 80 and then it dropped down.

Q. So it's possible that some of the students in that class had an IQ of 75 to 80?

A. Yes. Definitely they did.

Q. How often were those students' IQs tested?

A. Every three years. But at the beginning, I'm not sure. But I know later on, when things were more organized and we had a supervisor, it was every three years.

Q. What were the classification of the students in that special education program?

A. You're talking about TMR and EMR?

Q. Were some of those students TMR?

A. I'm not sure.

Q. Would you tell the Court what TMR is?

A. Trainable mentally retarded.

Q. How do you define TMR and EMR?

A. Educable you can learn skills and be productive in society. But mostly trainable students would function in the sheltered work shops or in a group home, things like this.

Q. Is it possible that Holly Wood was a TMR student?

A. [59] I can't say. I don't think so, but—

Q. Would your best guess be that he was an EMR student?

A. Yes.

Q. Did Holly Wood attend class on a regular basis?

A. Yes.

Q. Was he often tardy to your class?

A. I don't think so.

Q. Can you recall how he looked in your class—how he appeared to you?

A. He was—he looked neat, was clean.

Q. Did he ever come to school smelling bad?

A. No.

Q. Were his clothes dirty and messed up?

A. No.

Q. Did he routinely complete the work that you gave him?

A. Now that, I can't remember. Sometimes he tended to be a little late, but it could have been that he—the work might have been too difficult for him.

Q. Well, based on your experience as a teacher of Holly Wood, could you say that perhaps if he had applied himself more he could have done better?

A. [60] I'm sure everyone could do that.

Q. Do you recall how he behaved or acted in class?

A. He was fine.

Q. Was he usually attentive?

A. Now that, I'm not sure.

Q. Was he able to listen to you and follow your instructions?

A. Yes.

Q. Did you have to send him to the principal's office a lot?

A. No.

Q. So he didn't get in fights with a lot of people?

A. No.

Q. Was he something of a loner?

A. I don't think so. He had friends.

Q. He had friends like everyone else?

A. Yes, he did.

Q. Would you say he just fit in with the group?

A. Yes.

Q. Do you have any idea how Holly Wood got to school every day based on your personal knowledge?

A. Probably rode the bus.

Q. And he probably wouldn't have been employed [61] at that time; correct?

A. No.

Q. How old was he, again, when you had him?

A. Junior high age. Twelve and—probably no older than fifteen.

Q. Finally, you've taught a lot of students—

A. Yes.

Q. —in your experience as a teacher? Do you remember all of them?

A. Pretty much.

Q. Is there a particular reason why Holly Wood might stand out in your mind?

A. He was one of my first ones, and you tend to remember them better.

MR. JOHNSON: No more questions.

MS. HODKINSON: No redirect, Your Honor.

MELVIN WRIGHT

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Could you please state your name for the record?
A. Melvin Wright.
Q. Are you currently employed?
A. Yes.
Q. [62] Where are you currently employed?
A. Sanders Lead Company.
Q. Where is that company located?
A. Troy, Henderson Road.
Q. What is your job position or job title?
A. Casting supervisor.
Q. How many employees do you supervise in the course of your work?
A. Ten.
Q. What are your general job responsibilities or duties?
A. Casting department is lead in different forms, all different types of chemicals for specific different specs. And we skim the lead. We scrape the lead to get it clean and band the lead.
Q. During the course of your job, do you have an occasion to work with heavy equipment and machinery at all?
A. Basically just the fork lift.
Q. And during the course of your work, did you encounter a man by the name of Holly Wood?
A. Yes.
Q. In what capacity did you encounter this man?

A. I met him through my sister-in-law. He needed a job, and I hired him.

Q. [63] Do you remember exactly when that was?

A. It's been about somewhere between '82 and '84.

Q. Did Holly Wood have to complete any tests or training before he began working for your company?

A. We had to train him for his job.

Q. What training was that?

A. We had to show him how to pan lead, show him how to draw the lead, had to show him, you know, just how to cut machines on and off. Pretty much, that's about it.

Q. Records from the company indicate that he was trained in hazardous waste operations and hazardous waste operation skills and received a certificate of completion.

A. Forklift—drive a forklift occasionally. He had to be evaluated in order to—at the time for him to drive a forklift. And he had to prove to us that he could do the driving and work all the equipment correctly. And that's pretty much—

Q. So just to clarify for the Court, what equipment was Holly Wood trained to use?

A. Occasionally trained to drive a forklift.

Q. A forklift?

A. Uh-huh.

Q. [64] Did you work with Holly Wood on a daily basis?

A. Yes.

Q. What exactly were his job responsibilities?

A. His job mostly was to band the lead and scrape the lead.

Q. What hours did he typically work?

A. Back then, we had two shifts. Each shift was 7 to 7, 7 p.m. to 7 a.m.

Q. Did he work part of a time with other employees?

A. Yes. Something similar to assembly line.

Q. Did he get along with his other employees?

A. All the employees during that time that he worked with got along.

Q. So he was able to follow, your instructions and complete his work?

A. Yes.

Q. And he was able to cooperate in a civil manner with other employees?

A. Yes.

Q. Do you recall any discipline problems at all with Mr. Holly Wood?

A. None.

Q. Do the best of your recollection, do you [65] recall ever noticing anything off about Mr. Holly Wood?

A. No. He was average person. I didn't see nothing that should have been unusual.

Q. Did he appear to be like most of the other employees at your work?

A. Yes.

Q. How long was he employed by your company?

A. Approximately a year and a half to two years.

Q. Did there come a time when he stopped working for your company and then came back and worked for you again?

A. No. Only time he stopped is when the incident happened. And from that incident, he wasn't able to work no more.

Q. How would you characterize Mr. Wood as an employee?

A. Employee that did his job, came to work on time when he was scheduled to come, and got along with everyone.

Q. Was he dependable?

A. Yes.

Q. Would you characterize him as hard working?

A. Yes.

Q. [66] Do you recollect if he was eager? Did he ever ask for additional assignments?

A. No.

Q. Based on your own knowledge, do you know if he ever received bonuses or raises for his work?

A. In that department, each hour pump lead, it was a bonus involved. You get $3. We was getting hourly pay plus $15 for each pot that he pulled.

Q. Did he get that money on—

A. Every day.

Q. Given your personal knowledge, do you know why he left employment with your company?

A. He got into some trouble.

Q. Was he terminated for that reason?

A. I think he was incarcerated.

Q. Have you spoken with any of Mr. Holly Wood's counsel?

A. (Witness shakes head.)

Q. You have not spoken with anyone from that table?

A. (Witness shakes head.)

Q. So given your experience with Holly Wood, would you characterize him as a good employee?

A. I would say he was average employee.

MR. JOHNSON: I have no more questions at [67] this point.

CROSS EXAMINATION

BY MR. HOWLEY:

Q. In terms of what Holly Wood had to—I think you said he had to band lead?

A. Yeah. Band lead, scrape lead.

Q. What does banding lead involve?

A. Banding lead, it's put on a machine. It's a hard metal, and it's shaped. So we shape it and put three bands on it.

Q. So more than one man at a time bands the lead?

A. Yeah. It was assembly line.

Q. And what does skimming lead involve?

A. That involved we put all different kinds of chemicals in the lead. And the lead is already in liquid form and skim all the dirt that floats up to the top, then skim it off with a spoon.

Q. So Holly Wood's job was to skim the dirt and other material off the top?

A. Correct.

Q. Was he responsible for putting the chemicals in?

A. No.

Q. So we've got band lead, skim lead. What are [68] the others?

A. Scrape lead and stack the lead.

Q. What does scraping the lead involve?

A. It's particles that's on the outside of the lead, hard pieces of metal. We scrape that off so the lead have a good appearance.

Q. So he had to scrape the excess particles off the lead?

A. Yes.

Q. Stacking lead, what does that involve?

A. Stacking lead to what spec it is or what order it is and that mean what type of lead it is. If it's a regular hard lead, we stack seven high, like one layer, one layer, until it's seven high.

Q. So Mr. Wood's job was to physically stack the lead?

A. Yes.

Q. And who determined how high to stack it? Was he told how high to stack it?

A. Yes. That was routine. That was in the training from the beginning.

Q. For a person who would do Mr. Wood's job, was there any educational requirement? Did he have to have a high school diploma or anything?

A. No.

MR. HOWLEY: [69] I have no more questions for this witness.

MR. JOHNSON: Your Honor, I have a few questions on redirect.

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Would you characterize the work Mr. Wood did as dangerous?

A. Well, as a hazardous environment, if you wasn't watching what you was doing, it could be dangerous especially around the moving machinery.

Q. If he wasn't watching, what could happen?

A. Well, while stacking lead or either scraping lead, if you wasn't being alert, you could get your hand caught in the machine because the machine steadily runs. And if you wasn't alert, you could get easily hurt, your arm broken or cut off or anything.

Q. So did the work require a good deal of attention to detail?

A. Yes.

Q. Would you say it was complicated work?

A. Well, once you learned to do it, it wouldn't be complicated; but for a beginner, yes.

Q. How many different tasks was he trained to do?

A. [70] Four. Five if you're driving the forklift.

Q. Is that typical of the other employees at that time?

A. Yes. All the employees on that shift did the same thing in rotation.

Q. Could he operate any other machinery besides the forklift?

A. No more than just working on the machine stacking lead.

MR. JOHNSON: Okay. Thanks. No additional questions.

MR. HOWLEY: No further questions, Your Honor.

MR. HOWLEY: Petitioner calls Dr. Karen Salekin.

KAREN SALEKIN, PH.D.

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. HOWLEY:

Q. Please tell us your name.
A. Karen Lee Salekin.
Q. And what is your occupation?
A. I'm a clinical psychologist.
Q. Are you licensed as a psychologist?
A. I am.
Q. [71] And where are you licensed?
A. Alabama.
Q. And where are you currently employed?
A. University of Alabama in Tuscaloosa.
Q. Please describe for us your formal education after high school.
A. I went to Simon Fraser University at University of British Columbia in Canada for my undergraduate work. I have a double major in kinesiology and psychology. From there, I went onto graduate school at the University of North Texas, where I graduated with a degree in clinical psychology in 1997.

My internship during my five-year graduate program was done at Yale University between 1996 and '97. And following my graduate program, I went to a post-doctoral fellowship at the University of Massachusetts Medical Center in the law in psychiatry program.

Q. And just so I'm clear, both your master's and your Ph.D. are both from the University of North Texas?

A. They are. It's one program, but you kind of have to get your masters to get your—

Q. And can you describe your employment since [72] you got your Ph.D.?

A. Yes. Following my post-doctoral fellowship, I went with a group of psychologists to New Mexico under the Duran Decree to a women's prison to get it up to par in terms of mental health—providing mental health services.

I was there for approximately nine months and served as the interim clinical director of the program; basically established the treatment program, the assessment program, intake, those kinds of things as women were coming into the prison.

From there, I went to Florida where I worked in the court evaluation unit. It was a family court unit for juveniles and custody issues and parental fitness. I worked there for nine months. I took maternity leave after that.

And at that point, I moved to Alabama. And I've been working as a senior research coordinator in a child research lab since that point in time.

Q. Do you also hold a teaching position?

A. I could have. I am identified as adjunct faculty. I have done some, not in-class teaching, but supervision of those kind of duties. And I will be going into a faculty position as of mid month, of August 15.

Q. [73] Do you have any experience assessing individuals for mental retardation?

A. Yes, I do.

Q. And could you describe that experience?

A. Well, part of any clinical assessment, especially within the forensic realm, you always assess intellectual functioning. It's one of the basic tests that you do. You always consider it in terms of, well, situations; competency to stand trial, mental status, what have you. So in that respect, I do it all the time. Usually a screening person, so you don't necessarily have to go up and do a full WAIS or a full intellectual battery. So I know it in that respect.

I was also part of the standardization project for the Stanford-Binet 5. And in that capacity, I worked as a site coordinator, which really means you send out students to go out and give the Stanford-Binet to get concurrent validity, reliability, and normaling upon the Stanford-Binet 5.

They would come into me. I would check the protocols. Part of it was teaching how to do the Stanford-Binet. So basically in every realm, I think I have—

Q. Can you tell us what the Stanford-Binet test [74] is?

A. It's a full battery intellectual functioning. It's got—well, you can get nonverbal IQ, verbal IQ, full scale IQ, which are global measure alerts, intellectual functioning. It's then broken down into five domains, which just further delineate aspects of intellectual functioning.

Q. Are you also familiar with the Wechsler Adult Intelligence Scale?

A. I am.

Q. Can you tell us what that is?

A. It's a very similar test. The difference between the two or one of the primary differences is just the

way the test—for one thing, it's the way the test is actually administered in terms of—well, just the general administration. It also assesses different capacities but getting at the same global constructs, if that makes sense. So the Wechsler will have seven scales on verbal similarities, vocabulary comprehension as separate entities. And the same constructs are evaluated on the Stanford-Binet in just a different way.

The basic idea between intelligence tests is to have them measuring the same construct. It's called construct validity. If you end up going out [75] and doing an IQ with one measurement, it comes out at 60 and the next one comes out at 90, there's a problem. And you have to figure out what it is. So when the test developers actually developed the test, they looked to have concurrent validity with other test measures.

Q. Are you familiar with methods of assessing adaptive skills or adaptive functioning?

A. Yes, I am.

Q. And what methods are you familiar with?

A. I use the ABS-RC2 at this point in time, which is the American Association for Mental Retardation's adaptive functioning instrument. And that assesses the ten domains put forth by the AAMR that need to be assessed or should be assessed during an evaluation of mental retardation.

It also has a second—that's the independent personal functioning domain. It also has a behavioral domain or social functioning, which assesses eight domains.

I have used the Vineland a long, long time ago. It's not what I use. I'm familiar with the scales of independent functioning. But, again, I don't use those.

Q. And AAMR is American Association of Mental [76] Retardation?

A. Yes. They are basically the governing body who really determines mental retardation aspects thereof and what people should or should not be doing when they're evaluating and treating and stuff.

Q. Let me show you what we will mark as Petitioner's 19. Can you tell us what that is?

A. This is my CV.

Q. And does that accurately describe your education and employment?

A. Yes, it does.

Q. Does it also contain a list of your published writings?

A. Yes, it does. As far as I'm aware, of my publications that are currently in press, yes, it does.

MR. HOWLEY: Your Honor, I'd like to move 19 into evidence.

MR. HAYDEN: No objection.

THE COURT: Admitted.

MR. HOWLEY: I'd like to move that Dr. Salekin be accepted as an expert psychologist.

MR. HAYDEN: We would object. Basically, Your Honor, I don't believe the doctor testified to any testifying before the Court. I know she has [77] extensive experience and testimony in the field. If they could expand on her qualifications to testify here in court, I think that would take care of the problem.

Q. Dr. Salekin, could you describe—

THE COURT: And inasmuch as it may relate to other witnesses, I know there seems to be a developed practice in this state of tendering of witnesses—of expert witnesses. There's no evidentiary rule or other rule that requires that that be done. If you just simply qualify them and ask questions. If they want

to object, they can object based on lack of qualifications. But you won't have to tender any witness as an expert. Just qualify them and ask questions.

MR. HOWLEY: Thank you, Your Honor.

MR. HAYDEN: Yes, sir.

Q. Dr. Salekin, please describe for us what, if any, experience you have testifying in court proceedings.

A. I have basically years of experience starting in 1998 with my post-doctoral fellowship. I was part of a roving court evaluation unit. What that means is that one or two people who had wrote to the courts induce screening, competency, and mental status [78] evaluations. Within a couple of hours of meeting the person, doing the evaluation, you'd stand up in front of the Court, testify to your findings. And then the Court would actually rule at that point whether they needed to be detained or what they wanted to do with the person.

Working at Bridgewater State Hospital, I did full forensic evaluations, competency, mental status exams in a maximum security forensic hospital. Following doing any of the evaluations, you would go into court. You would testify to your findings and you go back. It was all held in the same area, so you would be in your office, you'd go to court, and you'd come back. So I testified numerous times at that one job.

Same thing in terms of Florida. I did approximately one hundred twenty evaluations within a nine-month period at the family court center.

I cannot tell you how many times I went to court to testify. Numerous. In the past year, I probably testified—I'm guessing—four or five times anyway in the state. Something like that anyway.

Q. Are you being compensated for your work on this case?

A. [79] Yes, I am.

Q. And how are you being compensated?

A. I am being paid by you; Faye Scholer.

Q. And what are you charging?

A. $200 per hour.

Q. And approximately how much have you charged today?

A. I haven't added it up recently. Although I did get the $6,000 retainer. Prior to getting that retainer, I had not worked up to the thirty hours. Since that time, I have. And honestly I can't estimate how many hours since that point in time.

Q. Just to be clear, the retainer is a deposit; it's not an additional amount over the—

A. Oh, no. No, no. It's just for—I asked for the retainer because I knew I was traveling to Atmore to do the evaluation and I would be stopping and talking to family members. So I knew in the span of two days, just to get basic evaluation started, I would have a number of hours already put in.

Q. Other than the work that you have done and are doing on this case, have you ever worked for me before?

A. No.

Q. Have you ever worked for any of the other [80] lawyers who are representing Mr. Wood?

A. No, I have not.

Q. Have you ever worked for Mr. Wood or anyone associated with him?

A. No, I have not.

Q. What were you asked to do as part of your retention in this case?

A. I was asked to do an evaluation of mental retardation for Mr. Wood, look at adaptive functioning and intellectual functioning.

MR. HOWLEY: I'd like to show the witness what we will mark as Petitioner's 20.

Q. Dr. Salekin, can you tell us what Petitioner's 20 is?

A. This is my written report of a psychological assessment that I conducted on Mr. Holly Wood.

Q. Does this set forth on the first page the records that you reviewed in connection with your assessment?

A. Yes, it does.

Q. The first entry says numerous court records provided to the examiner by the defense team. Am I right that the examiner is you?

A. Yes.

Q. And can you describe for us what records you [81] reviewed under that category of numerous court records?

A. I got a box full of records, which included the transcript of the original trial, information from the Rule 32 hearing, interviews and testimony with family members, school teachers, some information about Kenneth Trotter and lawyers and things like that.

The only thing I used that would even be relevant to what I was doing was information provided by family members, school teachers, and other people that would know him in the social domain and more about mental retardation.

I did not focus on, you know, legal aspects and things that—I can't explain it, but I really used the social information that was provided to me. I skimmed all the documents.

Q. And when you're talking about the social information you've got, this is from the transcript of the trial and the Rule 32 proceeding?

A. Right. Excuse me, there were also medical records, which I failed to say. But medical records

were also provided to me as part of the court documents. I did look at those.

Q. And did you understand those were medical [82] records that were exhibits in the Rule 32 proceeding?

A. I think so, yeah. I mean, they were provided at the same time up to 2000. And, yeah, that was part—and I also reviewed the more recent medical records this weekend.

Q. Let me show you what we're going to mark as 21. Would you take a look at these—I've got them in two stacks here to make them a little more manageable—and let us know if those are the records you reviewed.

A. Without going through—these look exactly like the documents that I reviewed. I would obviously have to compare them to know for sure, but they certainly look like it.

Within here, there are notes by people in terms of medication that he was put on; Elavil, trazodone, those kinds of things; diagnostic information; some IQ information, which I'm sure is somewhere in here. This segregation—yes, I've had that. Again, without going through everything, I can't say hundred percent. This all looks exactly like the information that I had.

MR. HOWLEY: Your Honor, the two stacks there, the first one has exhibit tabs, those are exhibits that were in the hearing, and the second set [83] is records we've received from the prison in response to our request pursuant to your order. And I'd move them in evidence.

MR. HAYDEN: As far as what has been previously entered into evidence, Your Honor—I don't want this record to get any more voluminous than it already is. That's not going to do anyone any good. Anything

that has not been previously introduced, either the prior Rule 32 hearing or at trial, I wouldn't have a problem as long as it's the basis of the doctor's report. But I don't want to get this record any larger than it needs to.

MR. HOWLEY: And we want them in because she reviewed them in preparing her report, Your Honor. And I promise you, that's the largest stack of documents I have.

MR. HAYDEN: Well, again, I'm not objecting that she not testify about what she's done. I'm talking about trying to keep a record—a file smaller—as small as possible. Because these Rule 32s, especially in capital cases, tend to get voluminous. I would just ask that whatever records are already in the record be kept out. Whatever records the doctor looked at that are not in a previous record or previous setting, those can be [84] admitted without objection.

THE COURT: Admitted.

Q. Going back to Petitioner's 20, your report, the next entry under review of records is psychological interview data entry form. Can you describe for us what that is?

A. Yeah. It looked—it was a piece of paper that was provided through corrections that had information regarding full scale IQ, nonverbal IQ, and verbal IQ on the WAIS. It also had information —real brief information in terms of the MMPI. Sometimes it had diagnostic information like whether they had identified that person—or Holly as being depressed, personality disorder, adjustment disorder. It also had comment sections on the bottom.

From my recollection, that was the basic format in which they had put their information. It looked like a

general intake form, although I don't know that for sure.

Q. Let me mark this as 22. Can you tell us what this is?

A. Yes. This is a psychological evaluation of Mr. Wood conducted in 1992 by Dr. McClaren.

Q. Is this the item listed on your report as forensic psychological evaluation completed by Michael [85] D'Errico, Ph.D.?

A. It is. I'm sorry, I didn't look at the back. It is this report, yes.

Q. And this is something you reviewed in preparing your report?

A. Yes, it is.

MR. HOWLEY: I'd move 22 into evidence, Your Honor.

MR. HAYDEN: No objection.

THE COURT: Admitted.

Q. I'd like to show you what's been previously marked as Petitioner's Exhibit 4. And I can take back 22.

Is the document that I just gave you, Petitioner's 4, the document that's referred on the first page of your report as the Outpatient Forensic Evaluation Report completed by Karl Kirkland, Ph.D.?

A. Yes, it is.

Q. And did you review this in connection with preparing your report?

A. Yes, I did.

Q. Let me show you Petitioner's 23. Can you tell us what Petitioner's 23 is?

A. Yes. This is the employment questionnaire and personnel envelo-file from Pepsi Cola. That was [86] listed as the last item on my review of records.

Q. And is this the document that's referred to on your report, Petitioner's 20, as employment questionnaire front page and personnel envelo-file from the Pepsi Cola Bottling Company?

A. Yes, it is.

Q. Did you review this in connection with preparing your report?

A. Yes, I did.

MR. HOWLEY: I move 23 in evidence.

MR. HAYDEN: No objection.

THE COURT: Admitted.

Q. Looking on—do you still have Petitioner's 20, your report?

A. Yes, I do.

Q. You have two entries there under consultations where you say in person interview with Ms. Johnnie Pearl Wood, sister of Mr. Wood. And both are dated July 14, '03. Why are there two entries?

A. I forgot to put Maeola a line, so I had a typographic error. Johnnie Pearl and Maeola were both interviewed on July 14th, on the same day.

Q. How much time did you spend with Johnnie Pearl?

A. I'm estimating—I have it written down, [87] but I'm estimating about an hour and a half to two hours.

Q. How much time did you spend with Maeola Wood?

A. Two hours.

Q. Looking above that, the telephone conversation with Mr. Charles Sport, principal of Mr. Wood's school, how much time did you spend on the phone with Mr. Sport?

A. About five minutes.

Q. How much time did you spend with Ms. Janet Penn?

A. More like ten minutes, fifteen minutes.

Q. How much time did you spend with Ms. Hilda Maddox?

A. About twenty minutes.

Q. And who is Steven Moyer, who is referred to here?

A. He was the psychometrist for Faye Sultan. At the time I began my involvement in this case, I was under the impression that contact with Faye Sultan might be okay, might be appropriate, would be appropriate. I contacted Steven Moyer to get an idea of testing, anything. He didn't know a thing at that point in time. He couldn't tell me anything aside [88] from the fact that he came to Alabama, did some testing, and gave it all to Dr. Sultan.

Q. Now, as a part of preparing your report, did you do an assessment of Mr. Wood's IQ?

A. Yes, I did.

Q. And what test or tests did you use to assess his IQ?

A. The Stanford-Binet 5.

Q. And why did you decide to use the Stanford-Binet test?

A. Well, I chose the Stanford-Binet because typically people use the WAIS. The WAIS is really the standard of practice, not because it's any better than the Stanford-Binet. People are more comfortable with it and use it more often.

One of my biggest concerns was the State's expert would use the WAIS and that we might be doing testing within a two-week period and whoever went first may get more accurate results than whoever went second. Of course, I didn't know who was testing who

and when. But I thought, you know, just to be careful, I'm going to do the Stanford-Binet.

I also knew that he had been tested at least three times with the WAIS in the past—distant past, mind you, but it was hard for me to judge based on [89] records whether he had been tested more than that. It was just really being cautious on my part.

Q. Are you familiar with a term "practice effects"?

A. Yes, I am.

Q. And can you describe what that means for us?

A. What it means is if you give a test, say the WAIS or MMPI or any kind of psychological instrument, to a person multiple times, then they may get to know aspects of that test and actually learn how to do the test over time, just from being exposed to it over time. So you want to reduce the chance of practice effects by doing something like this; one person do the WAIS, one person doing Stanford-Binet.

Q. And how much time did you spend with Mr. Wood?

A. Seven hours.

Q. And how much of that time was taken up doing the Stanford-Binet test?

A. I don't—I could look it up for you. I'm guessing around two hours, an hour and a half to two hours, something like that.

Q. And what did you do for the approximately five hours remaining?

A. [90] I interviewed him. I did a general sociological demographic kind of history on school, work, mental health programs, physical problems, those kinds of things. I administered the Understanding the Miranda Rights Test, the Test of Malingered Memory, and the Adaptive Behavior Skills Residential Community Version Number 2.

Q. What were the results of the Stanford-Binet test that you administered to Mr. Wood?

A. Well, I'd like to refer to my document. Okay. Verbal IQ was 66. Confidence interval for the verbal IQ was between 61 and 73. Nonverbal IQ was found to be 56. The confidence interval was 52 to 64. Full scale IQ was found to be 59, confidence interval between 56 to 64.

Q. Can you tell us what it means where you say 95 percent confidence interval and then you have a range? What does that mean?

A. There's a 95 percent chance that the true score of this test falls between for the full scale 56 to 64. What that really pertains to is error.

All psychological tests—any test really has the chance for error; whether that's due the environment, perhaps the person's mood, their attention. There's a variety of things that can [91] impact the results on any test. And so what the confidence interval does is it spreads it out far enough to say that taking into account all of those possible errors, whatever they may be, random, that their true score lies within this confidence interval.

Q. You make reference on Page 7 of your report that the conditions of the testing environment were not ideal.

A. Yes, that's true.

Q. Can you tell us what you mean by that?

A. Well, I did the testing in the visiting room at Holman Prison. There are four large fans, I think,—if I remember correctly—in the corners of the room. They are on full blast. They are somewhat noisy. And there's air sort of being circulated around the room to keep the temperature down.

On that day, it wasn't particularly hot. I didn't find it really hot in the room. But, I mean, it was mildly

uncomfortable to the point where if they had air conditioning, it would have been—I would have loved that. They didn't. It was no big deal.

So it was that kind of—just a little bit noisy and a little bit too warm basically.

Q. Other than the noise from the fans and the warmth, was there anything else that was not ideal [92] about the testing condition?

A. Well, let me explain to you what an ideal test situation really is. It's a small room, two chairs, one table, clear lighting, and you and the evaluee in that room. That's ideal.

Most of the time, especially in forensic cases, you don't have that opportunity to grab that ideal situation. That's usually in a university setting, perhaps your office, those kinds of sort of planned environments.

When you go into the forensic arena, you just have to—you have to go in and use what you're given. If I had gone in there and said, this is completely unacceptable, I cannot do the testing in here, I would never have done it. You make your judgment, you know, at that time.

For instance, the table that we used, yes, it had little circular seats that were uncomfortable. Was it, you know, completely debilitating? No.

But I put all of my, you know, test instruments directly in front of him in the way that I'm supposed to in standardized tests, yes. Had I not been able to do that, I would not have done the testing.

Q. You use the word "satisfactory" to describe [93] the testing conditions. What do you mean by that?

A. It means in my opinion the environment was not so negative or so outside of the norm that it invalidated the test results. Again, if I had thought that, there would have been no point for me to sit

there for seven hours and actually do the testing with him.

Q. What is the Wide Range Achievement Test?

A. That is a test of achievement. I also gave that to him. It's brief screen version. It gives you scores on reading, spelling, and mathematics. And it gives you grade scores in terms of—well, it gives you percentile ranks, grade scores, various standard scores, ways of interpreting it. But it is just a screener. It will tell you basically what level of functioning that person is at.

Q. And based on the Wide Range Achievement Test that you administered, what level of functioning did you find with Mr. Wood?

A. He came up with a reading score of sixth grade and a third grade math and a third grade spelling.

Q. Was there anything inconsistent between the Stanford-Binet results that you saw and the Wide Range Achievement Test?

A. [94] No. When you look at the standard score comparisons, there's really no difference. And what you would want—if you wanted to go looking for learning disabilities or something like that, you would look for discrepancies between Stanford Binet scores, the IQ scores, standard scores, and those found on the WRAT. And there were none. They're consistent with one another.

Q. You use the word "inter-subtest scatter" when you describe the Stanford-Binet Test results. Can you describe for us what that means?

A. What that means is you're looking for scales that are way out of the range. If you get a profile that says you scored a 1 on working memory, a really low score, but a 9 on visual spacial processing, what you're looking for is stark differences between the elements of the test. And if you find that, then you want to go further and see if there's a reason that perhaps

the nonverbal IQ is more appropriate or the verbal IQ is more appropriate to use as a measure.

Q. Did you find any inter-subtest scatter in the results of the Stanford-Binet Test you administered to Mr. Wood?

A. No. There was no significant scatter—intra or inter-subtest scatter.

Q. [95] Tell us what the test of malingered memory is.

A. That is a test of malingered memory. You're looking for people either grossly exaggerating their memory deficits or completely faking their memory deficits. And it was nonmed on a population of people with cognitive impairments, no cognitive impairments, dementia, aphasia, and one more group.

What you want to do is you want to see if the person is malingering by comparing their scores to those who are actually a clinical sample; i.e., those with cognitive impairment, dementia, or what have you.

And the way it works is you give two test trials or two training trials. And there are pictures. You just show them pictures, fifty of them. You ask them which one of—one picture. Then on the next fifty pages, it has two pictures. You ask them which one of these did you see before. You keep on going. They say, you know, this one, this one, this one, this one. So that's trial one. You do trial two exactly the same.

You want to see if there's some learning. And there should be some learning if—for the people that have done this test before the normative sample. [96] And then twenty minutes later, you do the retention phase. And to see if the person is faking, you go for — you look for scores that are unusually low within the clinical sample.

He scored 45 for this test. He did fine. There was no evidence of faking on this test.

Q. Could you tell us—on Page 8 of your report where you're reporting the Wide Range Achievement Test results, you have percentiles next to his grade level. Can you explain what each of those percentiles mean?

A. Yes. For his reading ability, which was assessed at the sixth grade level, that comes up to be the fourth percentile. And that means that 96 percent of the population, who this test was normed on in his age category, would score higher than he did on this test.

When you go down to the third grade level for spelling, it's—he's in the lower .9th percentile. He's verging on the, you know, lowest you can get essentially compared to his age group on this test and the same thing for the third grade level with .8th percentile.

Q. So just so I understand, when it says .8th percentile, that means 99.2 percent of who does [97] better?

A. Of the normative sample in his age category scored above him on this test. The WRAT is normed according to age. So it would be, say, forty-five to fifty-five or what have you.

Q. Can you tell us generally how you went about assessing Mr. Wood's function?

A. What I did I gave, as I already mentioned, the AAMR—the American Association of Mental Retardation's adaptive functioning skill they developed themselves.

I gave that to Johnnie Pearl. And I did so because it was my understanding and it is still my understanding that she is the person that would know him best in terms of oral functioning; in a variety of capacities, whether it be home, school, friendships. She lived with him. And at one point she was his—basically his guardian, caretaker.

When he came out of prison, he went to live with her. Any time he was out of jail, he was in her environment, her natural environment. She knew where he was. She knew his friendships, his relationships, and his general functioning in and out of her house. It wasn't like all of a sudden he disappeared at the age of fifteen. He was actually in and out of her [98] home frequently. So I gave that measurer to her given the idea that she is the best person.

This instrument is supposed to be given to the one person who knows that person best. And so that was what I did. If I had thought that there were two people who knew him best, I would have gone and done that.

Q. What is the AAMR Adaptive Behavior Scale?

A. In terms of what domains does it assess?

Q. Yes. What domains does it assess?

A. It has a personal—it has one group of questions that look at personal functioning, independent living, that kind of thing. And then they have part two, which is more of a personality—characteristics of personality and behavior problems.

And there are ten domains on part one, which I have listed in Appendix C. Instead of trying to remember all ten by heart, I will look at them and tell them to you.

There's independent living, physical development, economic activity, language development, numbers and time, domestic activity, prevocational vocational ability, self-direction, responsibility, and socialization on the first domain. Those are the ten domains that AAMR says you need to look at those [99] domains and find at least two deficits in adaptive functioning in conjunction with an IQ of less than 70 to be able to say that they're mentally retarded.

Q. How do you measure deficits?

A. Well, on this test, its normed. I chose the computer program, entered it twice to come up with the data. But it is normed against people who are mentally retarded. It does not go into people who are within the normal realm of functioning.

So they normed people—4,180, or somewhere in that range, of people who are either found to be mentally retarded within community or residential settings; i.e., they're living with their mom, but they can't function outside on their own; they're in a residential program where other mentally retarded people live. And they also have individuals that are on a list for mental retardation already identified with a wide range in terms of intellectual functioning.

Q. So when you say its normed using people who are already diagnosed as mentally retarded, what then would an average score mean on any of these domains?

A. An average score on this test means that they are functioning in the average range in comparison to other individuals with mental [100] retardation. It does not mean that they're average and they're the same as you or I or someone else who may go into, you know—I don't know—domestic activities where you function average to the normal population. This is not that.

This is within the context of mental retardation. They are not doing superior. They are more average. He had some that were superior, and I noted those in here. Independent—well, I could go through it. But he had a number of deficits.

On just part one, he had five out of ten that showed deficits at the average to poor range.

Q. And which of the five out of the ten showed average to poor deficits?

A. Domestic activity, in vocational—pre-vocational vocational activity, socialization, responsibility, and self-direction.

Q. How about on part two of this test, where did he show deficits?

A. He actually showed deficits on all eight categories for part two, which, again, is the personality domain, behavior problems domain.

Q. And what were the extents of his deficits?

A. Well, instead of letting me guess, I will—okay. All of the respondent's scores on part two were [101] in the average to poor range. So he had nothing above average or superior or very superior. It was all in the average to poor range.

I would have to look at my document, which I have with me, if you'd like to know specific findings in terms of the categories.

Q. On Page 9 of your report, you have some parentheticals giving percentiles and age equivalence. Can you explain what those percentiles and age equivalence mean?

A. Yes. Based on the normative sample—I'll look at domestic activity. He came up in the average range. Again, average range within mental retardation. So only 25 percent of the population of mentally retarded people that this test was normed on scored higher than he did.

Now, in terms of functional level, it equated to eight years, three months functional level.

Q. How about self-direction, what does that mean?

A. Okay. Self-direction was at the 50th percentile. That means that 50 percent of the people scored above him in that domain and 50 percent scored below him. And his age equivalent was less than three years, zero months.

Q. [102] So that's 50 percent of mentally retarded people scored higher than he did?

A. Absolutely, yes.

Q. How about responsibility?

A. That was, again, the 50th percentile and age equivalent of 5.3 years. So, again, 50 percent scored above him in terms of being more skilled in this adaptive functioning domain.

Q. And socialization?

A. Socialization was 63rd percentile. So that would be 37 percent of the population was above him in terms of functioning.

Q. And you have—on pre-vocational, vocational activity, you have him scored in the poor range. What does that mean in percentile and age equivalent?

A. Oh, on part two? The pre-vocational has 50 percentile. Is that what you asked, the 50 percentile?

Q. Yes.

A. That, again, would be 95 percent of the normative population for this test scored higher than he did on the ratings for vocational functioning.

Q. That's 95 percent of mentally retarded people scored higher than he did; is that correct?

A. [103] Yes.

Q. Now, looking at Page 7 of your report, you set forth some—I'll spell it out—WAIS IQ scores from prior years. Can you tell us what you had that you got these scores from?

A. Well, those were on the forms that I listed in the review of records, the psychological interview and data entry forms. Those were on those forms. That's where I got them from.

Q. And what information could you tell from the forms?

A. I could tell that they gave a WAIS at that point in time; that his—they were not labeled nonverbal,

verbal, and full scale; however, the very standard protocol would be to list them in that order. So I was looking at full scale IQ of 73, 73, and 69 based on just the standard way you would interpret those tests.

Q. What led you to believe that two of these may actually be the same test?

A. Well, looked like there was—okay. '85 and '91 on the 77 and 72, they weren't written very clearly. And on top of one of the record forms, it said something about '85 taken from '85 is what I remember it saying. So my supposition is they [104] actually didn't do the testing, but they took the information from the '85 WAIS and put it onto this form. I have no other basis for thinking that except that's what it looks like.

And in terms of when you look closely at the writing, the 7 and 2, it's kind of hard to tell.

Q. Did you make any determination of whether — well, let me go back. Did you reach any conclusion as to whether or not Mr. Wood is mentally retarded?

A. Yes, I did.

Q. And what is your conclusion?

A. My conclusion based on the DSM-4 criteria, which allows you to do intervals of functioning—mild, moderate, severe, profound—he falls within the mild mental retardation range, which is two domains of adaptive functioning having deficits and an IQ below 70 and above 50 to 55.

Q. Did you make any effort to determine whether there was onset of mental retardation prior to the age of eighteen?

A. Yes, I did. And the way I could do that was looking at school records, speaking with Maeola—Maeola Wood and Johnnie Pearl Wood, speaking with the teachers, their understanding of his functioning while he was in the classroom, why he went into the

[105] classroom, what EMR meant, how structured was the environment, could he or could he not do all of his homework, could he or could he not, you know —how was he in comparison with the other children within the mental retardation—or within the vocational rehabilitation track. So I used all of that information.

I would have loved to have had school records. That would have been fabulous, but there weren't any to be found.

Q. And were you in the courtroom when Ms. Maddox and Ms. Penn testified today?

A. Yes, I was.

Q. Was there anything in their testimony that leads you to question your conclusion that there was onset before age eighteen?

A. Nothing at all.

Q. Was there anything in their testimony that tended to support your conclusion that there was onset before eighteen?

A. Yes. The notion that he was functioning average to below average range within the vocational rehabilitation track suggests that he was not—he was not on the borderline. I mean, our field has a bright line at 70 for the mild. He wasn't up there. [106] She was talking—both of them were talking about him being more in the middle of that group; that he wasn't the best student, he didn't get the best grades, but he wasn't the worst either. And that actually bodes well for identification for mild mental retardation. The fact that he didn't attend all the time, definitely consistent with mental retardation.

Q. If I could take you back just a moment to the AAMR Adaptive Behavior Scale. Looking first at the pre-vocational vocational activity score of poor range, 50 percentile, age equivalent to three to six years, in

your professional opinion, do you consider that to be a significant deficit?

A. Yes, I do.

Q. How about the socialization 63rd percentile age equivalent less than three years?

A. Yes, I do.

Q. How about responsibility 50th percentile, age equivalent of 5—is that five years three months, or 5.3 years?

A. Yes, five years three months.

Q. Do you consider that a substantial deficit?

A. Yes, I do.

Q. Let me ask you about self-direction 50th percentile, age equivalent of less than three years, [107] is that a substantial deficit?

A. Yes, it is in my opinion.

Q. How about domestic activity 75th percentile, age equivalent of eight years three months, is that a significant deficit?

A. It is. It's not as significant as the other realms. Because, as you know, what we've discussed is the 25 percent of the population was better. But in terms of functioning in the real world, it would. He would have some difficulties in my opinion, say, getting set up with an apartment or cooking for himself or those kinds of things. It just happens to be that this is the highest. Within his deficits, this is where he might have a strength where people might be able to train him a little bit and get him on his feet.

Q. How about part two of these—is it proper to call them domains?

A. Uh-huh.

Q. Could you tell us whether in your opinion his deficits in the domains in part two are significant?

A. Yes, they were in my opinion.

Q. Is that true for each of the deficits—each of the domains in which you found deficits?

A. [108] Yes. Each of them show deficits at—I believe it was average to poor range on that. I would again have to look. Yes.

The only things that are asterisked on here are things that are below average. And I chose that to be reported because if you are functioning lower than 50th percentile or so, you are looking at within the mental retardation, so it's saying more than if—let's say he was at the 90th percentile, the very superior range, that's fine. That's good. That's one of his strengths. So I really—I denoted the things that came up in the average to poor range.

Q. Now, did you receive any data or documents prepared by the experts for the State?

A. Yes, I did. On Friday night, I spent a couple of hours trying to actually put the instruments and the paperwork back together. It was there. There were things that were missing. I couldn't read the WRAT. I don't know—I still don't know what they found for the WRAT. It was all blotted out. I wasn't given a profile sheet for the WAIS, so I couldn't look at the actual scores on what they meant. There was no interpretation of the Vineland.

I was provided with some interpretation of the Scales of Independent Behavior Revised, so that [109] was very helpful for me. I was actually able to look at that and say, okay, these are the areas that Mr. Ryans or Mr. Cargill or Mr. Whoever found for Mr. Wood.

But the Vineland was not that way. I was provided with raw scores. I did not have the manual with me. If I'd been provided with those things a week ago, I would have had no problem. I have the Vineland Ma-

nual. I could have sat there and reviewed it. Unfortunately, I didn't have it with me.

Q. So if you had been given legible copies, complete copies, and more time, you could have formed some opinion on those?

A. Uh-huh, yes. It's not uncommon for psychologists to look at each other's work whether it's just to check for calculation errors, interpretation errors, what have you.

MR. HOWLEY: I'd like to move Petitioner's 20 in evidence.

MR. HAYDEN: No objection.

THE COURT: Admitted.

MR. HOWLEY: I have no more questions for Dr. Salekin.

MR. HAYDEN: Your Honor, I'm going to cross the doctor. Can we take a lunch break now?

THE COURT: [110] Sure. I was going to say if it's extensive, let's just go ahead and take one now and return at one o'clock.

(A lunch break was had in the proceeding.)

CROSS EXAMINATION

BY MR. HAYDEN:

Q. My name is John Hayden, Doctor. And I'll be asking you questions on behalf of the State. If you don't understand something, please, ma'am, let me know. I'll be glad to repeat the question.

Doctor, when were you first contacted to perform an assessment and evaluation on the petitioner? Do you recall?

A. I don't know the exact date offhand, but I would estimate sometime in June.

Q. June of this year?

A. Uh-huh.

Q. 2003?

A. I'm guessing. I have it in my notes, but I don't know offhand.

Q. And you indicate on your front page of Petitioner's Exhibit 20, your psychological assessment, the individuals that you consulted as part of reaching your evaluation and your conclusions?

A. Uh-huh.

Q. [111] Spoke with two of the petitioner's sisters; is that right?

A. Yes. Johnnie Pearl and Maeola.

Q. Were there other individuals or family members in the area that you could have, but did not, consult?

A. Lillie Pearl—no, Lillie Jean came over to the house at the same time I was speaking with Johnnie Pearl, but it wasn't a separate conversation.

Q. So did you also speak to her?

A. Just a little bit, but I wouldn't say that any of the report is based on that. She was quietly sitting in the room shucking peas and basically listening to the conversation, but she was there.

Q. She didn't actually participate?

A. No.

Q. And forgive me, Doctor, I may have to jump around a bit. But on Page 9 of your report, the results of the Adaptive Behavior Scale?

A. Yes.

Q. Who was this test administered to?

A. Johnnie Pearl.

Q. And that's the petitioner's oldest sister?

A. Yes, it is.

Q. And so these test results are based on [112] information that she gave you?

A. Yes.

Q. And to go over them just briefly and help me understand, as an example, you indicate prevocational vocational 5th percentile age equivalent three to six years. Now, that age equivalent, three to six years, could you explain that a little bit further? What does that mean to the layman?

A. To me, I don't use it. I use—

Q. Pardon me, Doctor, if you could speak up a bit.

A. I don't use age equivalents in my interpretation. I report them for other people. I go by percentile rank. But the age equivalence means that age comparison to the normalative sample because you want to look at in comparison to the distribution how it was normed.

Q. Now, the information you also indicate in your report, I believe, on Page 4, first full paragraph, you speak of they. Is that his siblings that you're speaking of? They describe him as a self-centered individual and focused on material goods?

A. Yes. It was the combination of Johnnie Pearl and Maeola together.

Q. [113] And you elsewhere in your report, Doctor, draw the conclusion, I believe, on Page 6, last sentence of that partial paragraph, Available records suggest respondent was neither reliable or effective in his positions. I assume you're speaking of his—

A. I'm sorry, where are you?

Q. I'm sorry. Page 6. That small piece of paragraph at the top. You're speaking about his work record there?

A. Yes. I only had minimal information at that point in time.

Q. And did you review some of his work records, those that you could obtain?

A. Yeah. I found that he was absent for four days without notice and that he didn't show up for work.

Q. Did you hear the testimony this morning from Mr. Wright who worked with him at Sanders Lead Company?

A. I sure did.

Q. And I believe Mr. Wright indicated that he was a good employee, reliable employee?

A. Uh-huh. Yes, he did.

Q. Does that change your evaluation or your finding in that paragraph, Doctor?

A. [114] In that, yes, had I been able to speak with him prior to writing my report, I would have included that and said that he had functioned well within an unskilled labor task, is what I would have said; and that he had no problems with responsibilities within that realm; and that he was reported to be comparable.

Q. Did you speak with any of his former employers?

A. I did speak with Mr. Wright. And I tried to get in touch with Jerry Armstrong, but I was told they didn't have his home number.

Q. Who is Mr. Armstrong?

A. He was the supervisor at Pepsi.

Q. How did Johnnie Pearl Wood—did you just give her the test, or did you have conversation with her about how the petitioner was when he was a young individual or younger person?

A. I spoke with her separately and then—yes.

Q. And there was some indication that, of course, he was self-centered apparently. Was there any indication that he was helpful in the family, did things for the family?

A. Not in the sense of a consistent pattern. What she did say when he was younger they all had to work in the fields just like everybody did. Sometimes [115] he would leave early. Sometimes he wouldn't do his share in terms of providing money or any kind of food or anything for their family. And, in fact, she

had mentioned that sometimes he would just disappear with the car when he was supposed to have left it with them to go get things for the home.

Q. Doctor, did you ever review the testimony from Johnnie Pearl Wood, the trial testimony that she gave during the original trial in 1994?

A. I would have—if that was provided—and I believe it was—I would have reviewed it prior to doing any testing.

Q. And if she had indicated in her original trial testimony that he had quit school in order to get a job, I believe, age fifteen, he got a job with Pepsi to help provide for the younger children, he bought a car so that they could go to the store, he gave money to Ms. Wood, they described him as a loving person, he was a leader, always helped them provide, and indicated they wouldn't have been able to make it without him, that's inconsistent with what she's telling you now?

A. Part of it is, yes.

Q. So you're getting—if there's evidence of inconsistent data from 1994 to now, would that cause [116] any change in your evaluation or report, Doctor?

A. If the inconsistencies were across everybody. In terms of speaking with Maeola and Johnnie Pearl, when I spoke with them, they both independently didn't know I was coming, said exactly the same things to me. Then when I was speaking with Mr. Wood himself, he was not hesitant to say that he wasn't the most helpful person around the home, responsible person, nor would he say that he was one of the primary providers for the family. He did indicate that at times while he was working he would provide some money to the family.

Q. Did you indicate or make it known to Johnnie Pearl Wood and the other sister what the purpose of your visit was for?

A. Yes, I did.

Q. And it was for a mental evaluation or assessment in order to help her brother possibly get off death row?

A. I don't say that.

Q. What did you tell them?

A. Told them I'm coming to your house at the request of your brother's defense team, any questions that I ask you can be printed into a report. I want you to be as honest as possible; that if you don't [117] understand, you know, the meaning of something, ask me. If I ask you a question that you choose not to answer, please do not lie to me about it, just say I do not feel comfortable with that question. This is a competency to stand trial mental status Rule 32 hearing. My purpose to go in there is to conduct an evaluation. And that's what they know.

Q. If they were giving you information, though, Doctor, that is what seems to be—and I don't want to put it in any other way, but what seems to be inconsistent with what they have given under oath some nine years before this—and, of course, I'm asking you to assume if they had given you information that he was helpful, that he did do all the things that you have described, how might that affect your evaluation or your conclusion?

A. My conclusion within that one domain of functioning, if I had enough sources, if I had gone out and got more information and it was all inconsistent, then my conclusion would be—I really don't know because everybody is telling me different things without something having some consistency.

Q. Were you hampered—I say hampered. Were you restricted in any way with who you could talk to or who you could seek information from?

A. [118] Two people refused to speak with me.

Q. And those individuals, I believe, worked at the Department of Corrections?

A. Yes, they did.

Q. Anyone else that you tried to contact?

A. I tried to talk to Gary Spurlan. I left numerous, numerous messages for him. He never contacted me. Alfreida Griffen I contacted, and she was willing to talk to me, but it took me a long time to speak with her.

Q. Now, Doctor, you're familiar with, I believe, it's DSM-4 Diagnostic Manual. Is that generally accepted and used for persons like yourself in the mental health profession?

A. Uh-huh.

Q. And I don't know—did you directly consult it on this particular occasion, or have you consulted it in the past?

A. I always look to the DSM for whatever I'm doing.

Q. And under the DSM-4, Doctor, it indicates it would be useful to gather evidence for deficiencies for adaptive functioning from one or more reliable independent sources. Would you agree with that?

A. Absolutely. If there are sources that can [119] provide the information that I'm looking for, then I'm more than willing to do that; that I believe are accurate in terms of their reporting 100 percent, I'll get as many of them as I could.

Q. But in this particular occasion, Ms. Wood was about the only reliable independent source that you could find?

A. In my opinion. I can explain why that is my opinion. The reason is because she knew him from birth until the time he left her home around fifteen or

sixteen or somewhere in there. He would go in and out of her home to jail to prison, grab food, grab clothing. She knew his ex-girlfriends. She knew his friends. She knew his activities prior to going into prison. In prison, the correctional officers only knows the domains of functioning that can be assessed within the confines of the prison setting. There is very, very limited room for problems. If a person is adapting poorly within the prison setting, that tells you more about their adaptive functioning levels meaning in a structured environment where people are telling what you to do, they give you your food, they give you your clothes. You don't have to do anything. That's actually telling you a lot. And measures like the ABS and those kinds of things aren't [120] geared to give those measures full scale to those kinds of people. If you want to give them to them, you can give them certain domains where they can actually have information to comment on.

Q. But in your opinion, it would not have been relevant to this particular case?

A. It would not have been valid, correctional officers, to give them the Vineland. They use the appropriate classroom measures with the teachers. They would be going on thirty years ago in terms of their memory. When I spoke with them over the phone, both of them said this is thirty years ago, I don't remember specifics, I remember vaguely, I remember that he was average to below average in terms of functioning, I remember that he got along with the kids. But they could not tell me specific grade levels. They couldn't tell me, you know, basic things that if you're filling out the Vineland you've got to know, you've got to be there. The Vineland is used primarily with teachers with the child at the same time. The child is in your classroom when you

fill out the Vineland. It's not meant to be thirty years post.

Q. So the information in your assessment, Doctor, would it be fair to say is only accurate as [121] the information is accurate you obtain from the source you get?

A. For all adaptive measures, that's true.

Q. Due to passage of time or whatnot, someone might be giving you inaccurate information that might cause an inaccurate result?

A. Absolutely.

Q. Also from the DSM-4, Doctor, it indicates that mental retardation is not necessarily a lifelong disorder. Do you agree with that statement?

A. Well—

Q. And I'm going to ask you a couple of questions. Is that fair that mild retardation may fluctuate between mildly mentally retarded and possibly not mildly mentally retarded?

A. In terms of adaptive functioning, you're absolutely correct. Because with training, supervision, support system, they can put into place of mild mental retardation category with minor deficits in three domains. If they get the necessary supports that they need to function in the community and they change the adaptive functioning level, they can actually improve.

Q. Doctor, let's kind of break it down a bit between IQ and adaptive functioning. Can you explain [122] for the Court how do you take these particular two scores and reach an overall diagnosis? Is there one given more weight than another? Let me ask that.

A. You absolutely have to have both is the answer to that. Generally if you have higher IQ, you're generally going to have less problems. Lower, your IQ goes say into severe profound range, the poorer your

adaptive function is going to go. It's not one to one in any way, shape, or form.

Q. You don't average them up and divide by two and say here it is?

A. No. But what you do need if you're going by AAMR standards or DSM, they give bright line distinction. And it is below 70 two domains. I mean, you just—that's what you do. In terms of diagnostics as a psychologist, that's what you're asked to do.

Q. The AAMR, American Association of Mental Retardation, 70 is their cutoff; is that right?

A. Yes.

Q. And in Alabama, of course, our legislature has not quite seen fit to give us a definition of what legal mental retardation is. But most states use 70?

A. Uh-huh.

Q. If Alabama were to adopt say 65 as the [123] floor, would that change your results in any way?

A. If it was a legal determination?

Q. If the Alabama legislature came out and said IQ of 65 instead of 70 and severe problems in adaptive function, would that change your result or change the bottom line of your evaluation?

A. I'm a psychologist, so I don't go by—legal standards are very important in terms of, you know, making decisions like this in the courtroom. As a psychologist, we look towards functional capacities and what does it mean for the person's treatment, you know, consideration, those kinds of things. So, yeah, if I was to come in here and that was the criteria, I would not be able to say, you know, that he is mentally retard. If his IQ is, say, 68, it wouldn't be possible for me to do that in the courtroom. However, you take it out and go to functional areas, like you try to do education planning or rehabilitation programs,

what have you, it becomes—the bright line distinction becomes less important.

Q. So a lower IQ may cause a different and—not truthful, but might cause you to say, well, maybe he's not mildly retarded?

A. I don't believe it's determined that I have to say that. A person with 65 regardless of what the [124] State says is mentally retarded, 65 IQ, that doesn't change. It's still cognitive capacities test at 65. When the score was, say, 57, that doesn't change. It's not changed by someone changing the rules. You would have to change it up to functioning. You actually have to go in and do something to help the person, provide support for this person, have a home environment where there's, you know, love and attention and help with homework and teaching, you know, those kinds of things. That's what actually help people with mental retardation function.

Q. Did you discuss with the petitioner, Doctor, his activities after the age of eighteen, where he worked?

A. Sure, uh-huh.

Q. And how many jobs did he have that you can recall? I think in your report it said he worked for Coke-Cola and Pepsi as a laborer, at a pulp mill, construction work, and self-employed doing odd jobs?

A. Uh-huh. Catching chickens I think.

Q. I'm sorry?

A. I think he told me catching chickens was his first job.

Q. When he was approximately thirteen, you are correct. Did you ever discuss him traveling around [125] the state, outside the state, how he got to where he went?

A. Sure. He knows how to drive a car. He's had a few cars.

Q. He had cars? More than one?

A. Apparently. I think he said four and maybe even more than that. But my understanding is approximately four cars, and he began driving at a very early age as well.

Q. So apparently he drove at an early age, borrowed cars, he was able to travel out and about by himself?

A. Sure, yeah.

Q. Did you ever discuss with him traveling outside the state to Florida?

A. Oh, yeah. He went and visited. He drove his car to Florida as well. It was a relative, I believe.

Q. Did he discuss where he stayed, how he stayed, how he paid for his way?

A. No.

Q. You'd indicated that there was difficulty in—one of the areas you seemed to focus on he never learned to cook and indicated he didn't clean or clean where he lived; is that right, Doctor?

A. [126] Yeah. Domestic activity is one of the domains.

Q. Well, if he were working making money and leaving the other domestic chores to the sisters when he was living with them, would there really be any need for him to learn how to cook and clean if someone else were doing it for him?

A. In terms of—the issue is whether he can do it, not whether he wants to do it. The issue is actually physical ability. And that is what when I was talking to Johnnie Pearl the issue was always do you think he can do this, and that was how this thing was scored. It wasn't did he do it. And the fact that he was employed is great. I mean, its wonderful. He was on an assembly line which is completely consistent with mild mental retardation.

Q. Did you ask him if he could cook?

A. No. Because adaptive functioning skills are not intended to be given to the individual. They are intended to be given to a rater who knows them. And the basis for that is the person you are evaluating often times does not have an accurate perception of their own ability which is why you go to a rater who knows them well.

Q. So you didn't ask him if he could cook any[127] food or things like that?

A. No, I didn't.

Q. And I think you were here earlier this morning, Doctor, for the testimony of Sergeant Everage?

A. Yes, I was.

Q. And she indicated that the petitioner gave her a false identification or gave her a driver's license that was not his?

A. Uh-huh.

Q. And tried to explain that it was him?

A. Right.

Q. To you, does that show any adaptive functioning whatsoever?

A. Not exactly. From my understanding of the way it transpired, he gave the false ID, which is not inconsistent. It's just something that anybody—well, it's not inconsistent with it. Let's just say that. And then he ran, which actually shows very poor judgment. Because if somebody is stopping you for a speeding ticket or something, which is a minor offense, and you choose to run, now you have an escape charge. So his judgment in my opinion was quite impaired. Somebody in the more normal spectrum with cognitive cause and effect relationships would have [128] said, yes, this isn't a good idea maybe or he wouldn't try to get out of it by giving a false ID. But then to follow it up running and then to follow up by going and picking up the truck, that's not really

good judgment that he understands the consequence of his own behavior at times and maybe he really thought he'd get away.

Q. Your answer is no?

A. Right.

Q. And I hate to belabor the point, Doctor, but I just want to go back to the percentile and percentages and age equivalents one more time on the ABS Scale. Individuals that operate within these ranges, would they be able to do the things that the evidence and testimony had shown that the petitioner obviously can do?

A. Yes.

Q. Work at a lead plant in a highly specialized job or special function around dangerous chemicals?

A. Yes.

Q. Can drive?

A. (Witness nods.) Absolutely. Mild mental retardation, it's something people function in very well in jobs. They have families.

Q. Well, these scales or scores, Doctor, these [129] compare the individual being evaluated with individuals that already that have been diagnosed, otherwise confirmed, as being mentally retarded; is that right?

A. Yes.

Q. And when you went to give this test to Mr. Wood, did you presume or have a presumption that the petitioner was mentally retarded?

A. Absolutely not.

Q. Then why did you pick this particular test, Doctor?

A. Because I needed to find out if he was. And if he was, then I would be able to determine within that population where he fell. If he came up very superior

or even above average, then I wouldn't be saying what I'm saying.

Q. Well, how did he perform with you, Doctor? I think you indicate in your report that he was cooperative?

A. Yes, he was.

Q. Able to follow instructions?

A. Yeah.

Q. Did everything you asked him to do when you asked him to do it?

A. Yes, he did.

Q. [130] Doctor, did you learn very much about the specific facts behind the offense that has brought Mr. Wood here today, this capital murder?

A. Not any more than was provided me in the document, real basic stuff, police incident report.

Q. So you're aware that he went to the victim's home, broke into the home, shot her in the head?

A. (Witness nods.)

Q. Fled the scene?

A. Yes.

Q. Went out in the woods and buried the gun?

A. I don't know if I read that part. But I know the basics; that he went in and shot her, left. And I believe my recollection is he was found at his father's house.

Q. He also gave a story to the police?

A. Uh-huh.

Q. You indicate that he understood his Miranda Rights. Are you aware in this case that he did not waive his Miranda rights and gave a formal statement?

A. I'm not aware of it.

Q. Are you aware that he testified during the last trial during his suppression hearing?

A. Offhand, I don't know.

Q. So you didn't review this? For this record, [131] this is the trial record on direct Pages 156 to 169. You didn't review this as part of your assessment?

A. Honestly, I had so many records, I can't tell you right now. You can show it to me and I may recall reading it.

MR. HAYDEN: Can I approach, Your Honor?

THE COURT: You may.

A. I don't recall this, no. It doesn't mean that I didn't, but I don't remember.

Q. You could have looked at that time; you just can't recall?

A. Right.

Q. If the fact, Doctor, that the petitioner could explain away why he made certain statements to police would that not factor into whether his cognitive functioning was above mentally retarded?

A. You would need to give me an example.

Q. Well, testimony at trial indicated that he gave a statement to the police unsolicited about shooting the victim in the head.

A. Okay.

Q. The testimony was from the police officers that was not the result of any questioning or anything. He testified at the suppression hearing that it was derived from information he got from [132] police officers after he had been arrested basically trying to explain away why he made this particular statement.

A. Uh-huh.

Q. Now, if he could do that, would that not indicate that he had good adaptive function?

A. No. He was unsuccessful at it for one thing, which means his choice to use that was maladaptive because it actually got him into more trouble. If he was actually adapted well in the situation that you're

talking about, he wouldn't have said a word. He would have been very quiet, good adaptive functioning. And it would show cognitive skills above what he shows. That was impulsive. He didn't have control of his—he was really going by emotion. He wasn't doing anything rationally, very typical for people with mild retardation.

Q. So the fact that he provided what some might call a pretty good excuse for why he said what he said is no reason to change your report; is that right?

A. No.

Q. Now, Doctor, when you gave the petitioner his test—and it looks like you gave him approximately four, the SB-5, the TOMM, WRAT-3, and an instrument to understand the Miranda Rights?

A. [133] Yes.

Q. Prior to giving him each of these tests, did you explain to him the function of the tests?

A. No.

Q. You did not?

A. Nu-huh.

Q. Why wouldn't you do that?

A. Because that's not standard protocol.

Q. So you're giving him a test, he doesn't know what it's for?

A. Exactly.

Q. And that's to try to keep from getting false readings and things like that, to try to manipulate the test?

A. Right. You don't want to tell somebody why you're doing something in case that affects their answer. So you go by the instructions about how to start the administration, how to finish it, and what things to say to the person during the administration.

Q. Doctor, going back to the Adaptive Behavior Scale, is there a numerical value that you give an

overall—like, you give several subtests of the SB-5. And you would look at different areas or domains, and you come up with a numerical value. I believe in your case it's 59?

A. Uh-huh.

Q. Do you do the same thing or is it possible to do the same thing with the adaptive behavior scales?

A. Not exactly the same thing as the adaptive behaviors. There are three factors on part one and two factors or part two. And what those factors do they have different domains they assess. And they put them together to get an overall rating. So the factor one—I have it in here. I forget the name of it. I think it's personal self-sufficiency. He actually did quite well. He did better on that factor than other people with mental retardation because it taps into the things he does well. So, yes, you can do it.

Q. And you didn't do it this occasion?

A. I did. It's reported in here.

Q. I'm sorry, ma'am, an overall score?

A. They're called factor scores. There's three factors. Let me explain what factor is. You throw all sorts of items and match them up with items that come together to form cohesive units. So when they labeled it personal self-sufficiency, they put together things like toilet use, eating food—I can't remember all of them. They're in the manual, though. The idea is you come together with a lot of [135] items that measure and you do that by putting together information from different subdomains. So for argument sake, let's say he did domestic functioning okay, he did great. He did superior, I believe, on that. So it's independent living, economic activity, and numbers and time, awful, which are important for personal self-sufficiency. So factor one is going to show a

greater level of functioning within the mental retardation range.

Q. Let me ask you a couple of questions as we go to the bottom of Page 9, last paragraph. I think you indicate under Part 1 self-sufficiency quotient that he has required ability to live alone in a residential facility. So he can live by himself if he liked?

A. What this test is measuring is his functioning in comparison to mentally retarded individuals that have to be institutionalized that's severe and profound level, mild to moderate. There's a lot of them that range that can function independently. And as you're saying, hold jobs, live in an apartment, and function with the necessary supports. What this test is saying that he's functioning, you can probably go out, you can help him establish an apartment, he can probably function okay [136] in that area, which is consistent. And he had mental retardation cognitive incapacities that are associated with more severe mental retardation, which, again, would be associated with more severe deficits in adaptive functioning.

Q. So he can live alone independently?

A. Yes. I believe it says he has the skill to live alone and outside.

Q. Has the skills?

A. Yes.

Q. Or abilities?

A. Minimal abilities which basically says he can do it on a minimal level. Again, remember factor scores are telling you a combination of domains. They're not telling you this subdomain is what you've got to look at in terms of mental retardation.

Q. Okay. Personal social responsibility quotient indicates that he has minimal abilities required to conform to society's interpersonal demands. That

means he can associate with individuals if he chooses to do so?

A. He's at the minimal level, so he is still going to have problems in the community. But he's got minimal capacities, like all of us, you know, have some areas of concern whether it's communicating with [137] others or whatever. He is functioning at the very minimal level that says, yes, he can interact.

Q. I just want to go over a couple of more things with you, Doctor. I understand you tried to contact other individuals in preparing this assessment. And you were either unable—effort was made, but you were unable to do that?

A. Yes.

Q. You did speak with Mr. Moyer, I believe, who is the psychometrist for Dr. Sultan?

A. Yes, briefly.

Q. You didn't speak with Dr. Sultan?

A. No, I did not.

Q. Would it be fair to say, Doctor, that psychology and psychiatry is not an exact science?

A. Absolutely.

Q. Experts in the field sometimes disagree about evaluations or whether someone is or is not mentally retarded, mild mentally retarded or not?

A. Absolutely.

MR. HAYDEN: I don't have any more questions at this time, Judge.

MR. HOWLEY: I have no questions. We have no more witnesses to put on, Your Honor.

BARBARA SILER

[138]was sworn and testified as follows:

DIRECT EXAMINATION

BY MS. DANLEI:

Q. This will be pretty short, and I know you're not real happy to be here. Could you tell us your name for the record, please?

A. Barbara Siler.

Q. Where do you live, Barbara?

A. Troy.

Q. How long have you lived in Troy?

A. Off and on all my life, but I did live in Enterprise for ten years.

Q. When was that?

A. It was in the eighties.

Q. Did you go to high school here in Troy?

A. Goshen.

Q. Is that sort of the outskirts of Troy?

A. Uh-huh.

Q. Did you graduate from Goshen High School?

A. Yes.

Q. What year was that?

A. 1980.

Q. Do you know the petitioner here today Holly Wood?

A. Yes.

Q. [139] How do you know Mr. Wood?

A. We dated.

Q. You dated?

A. Yes.

Q. When did you date Mr. Wood?

A. We started about in 1981, I'm thinking.

Q. And how long did you date him?

A. 1984.

Q. So you dated him about three years?

A. Yes.

Q. Where did you meet him? Did you meet him here in town?

A. No. I met him in the Spring Hill Projects.

Q. Where is that?

A. It's out from Troy.

Q. But in the general area?

A. Yes.

Q. Did he live in Troy at that time or Spring Hill?

A. He was living in Spring Hill, also.

Q. Do you know who he was living with?

A. Dorothy Bean.

Q. Who is that?

A. I don't know who she is. That's who he was living with when I met him.

Q. [140] Did he eventually move from the Spring Hill Projects?

A. Yes.

Q. Where did he move?

A. Back to Luverne.

Q. And you continued to date him?

A. Yes.

Q. So how did that sort of work? Did you see him when, since you lived in different places?

A. Could you repeat the question?

Q. Since you guys—he lived in Luverne and you lived in Troy. How did you carry on the relationship long distance?

A. He would come over to see me.

Q. So on the weekends?

A. Yes. And sometimes through the week.

Q. Did he come over most weekends?

A. Yes.

Q. Did he drive over from Luverne?

A. Yes.

Q. Just generally, what kind of a boyfriend was he at the beginning of your relationship? I know ob-

viously things went bad. But for the most part, what kind of a boyfriend was he?

A. He was all right in the beginning.

Q. [141] Was he nice?

A. Yes, he was nice.

Q. Did he take good care of himself?

A. Yes.

Q. How was his appearance?

A. His appearance was nice.

Q. Did he care a lot about how he dressed?

A. Yes.

Q. Did he care a lot about his hair?

A. Yes.

Q. Did he care about his clothes and how clean they were? Did he launder a lot?

A. Yes, he laundered his clothes.

Q. Did he work while you dated him?

A. Yes.

Q. Where did he work? Do you remember?

A. When I met him, he was working with the Coke-Cola Company. And then—

Q. Do you know what he did for the Coke company?

A. He was a delivery man.

Q. He drove a delivery truck?

A. Yes.

Q. What else did he do? Do you remember any other jobs?

A. [142] He told me he worked for a funeral home company in Luverne, and then he worked for Sanders Lead.

Q. Sanders Lead?

A. Uh-huh.

Q. Did he seem to be a pretty good worker from what you know? Kept a job? You may not know anything about that.

A. Well, when he was working at Sanders, he went to work.

Q. Did he always seem to have money?

A. Yes, he had money.

Q. Did it ever seem to be—wait, let me back up. One time you said he had a car, and he drove from Luverne to Troy to see you. Did he have different cars throughout your relationship?

A. Yes. I can remember three cars he had during that relationship.

Q. Seems to me that we've heard that he liked his cars; is that true?

A. Yes.

Q. Did he keep his cars up?

A. Yes. He kept his cars detailed good.

Q. Proud of his cars?

A. Yes.

Q. [143] When he would come over from Luverne and you guys would go and do things, what would you do? Can you just think of a few things that you would do when he would be here visiting?

A. We would go to my sister's house and visit my brothers.

Q. So you took him to visit your family?

A. Yes.

Q. Did you ever meet Holly's family?

A. Yes.

Q. How was Holly's family towards Holly?

A. They was nice.

Q. Did they love Holly a lot?

A. Yes, they did.

Q. Did a lot for him?

A. Yes.

Q. Did you ever see a driver's license? Did you know him to ever possess a driver's license in his name with his picture? You may—again, just what you know.

A. I think I seen a driver's license when I first met him.

Q. Did he drive you around most of the time in town?

A. Yes. Or sometimes I would drive.

Q. [144] When he would come here, where would you all stay when he would come to visit?

A. Motel.

Q. Let me ask you this. When he would come and you would get a motel, who would go in and get the motel?

A. He would.

Q. Would he go in and he would get the room and get the key, come back out to the car and say I've got the room?

A. Yes.

Q. And y'all would go in?

A. Yes.

Q. Did he always do that?

A. Yes, he always did that.

Q. He didn't make you go in?

A. No.

Q. He was pretty capable?

A. Yes.

Q. At some point obviously, since Mr. Wood shot you, your relationship went bad. How far into it did things start going bad?

A. Maybe about a year and a half into the relationship.

Q. What sort of things changed? Can you [145] pinpoint it?

A. He was abusive.

Q. Did he have a bad temper?

A. He could get upset, yes.

Q. So when something upset him, he would get mad at you?

A. Yes.

Q. But, again, that was about what? A year and a half into the relationship?

A. Yes.

Q. Did y'all ever talk about marriage?

A. Once, yes.

Q. This was how far into the relationship?

A. I don't remember how far into the relationship it were, but we talked about it.

Q. But you did talk about it?

A. Yes.

Q. Were you aware that he had a child with another woman?

A. Yes.

Q. Did you ever meet either the child or other woman?

A. No, I didn't.

Q. Did he ever talk about the child or woman?

A. He told me when she filed child support. He [146] showed me the letter that she was filing child support.

Q. Oh, he did?

A. Uh-huh.

Q. Did he ever pay child support that you're aware of?

A. I'm not aware of it.

Q. He was able to read the letter that was sent?

A. Yes.

Q. Was this some sort of a court paper?

A. Yes.

Q. Asking for child support?

A. Yes.

Q. So if you could just—what happened towards the end of the relationship when Mr. Wood shot you? Could you just sort of lead us up to that point just briefly?

A. Well, the sheriff had came down to my mom's house, and it upset my mom pretty much. And then that's when I decided to end the relationship.

Q. Were y'all fighting? Is that—when the sheriff came, were you having an argument?

A. It was an argument.

Q. So you decided to end the relationship?

A. [147] Yes.

Q. And what happened after that?

A. What happened after that?

Q. Yeah. What happened after you had tried to end the relationship? Did he let you just walk away?

A. He got upset about it.

Q. And what? I'm sorry?

A. He got upset and he wanted to talk to me. But I knew he was upset, and I didn't want to talk with him while he was upset.

Q. So what did he do? Is this when he shot you?

A. Yes.

Q. How did that happen?

A. He sent one of his friends to the door to tell me to come outside.

Q. Let me stop you there. Because he probably knew if you saw him at the door, you wouldn't come out? Is that why he sent a friend, do you think?

MR. HOWLEY: Objection to the extent she's asking for what—

Q. Okay. Let me ask you this. Why do you think he sent a friend to the door?

A. At that particular time, my mama had said—the sheriff had been there. She said she didn't want [148] him to come back to our house any more, and that's probably why he sent the friend to the door to tell me to come outside.

Q. Because he wouldn't have been let in? Would that be safe to assume?

A. Right.

Q. So he sent the friend to the door. Then what happened?

A. And his friend told me to come outside, he wanted to talk with me. I told him no. Then as I was standing in the door, he was outside. And he asked me also to come outside and talk with him. And I told him no. And a few minutes later—

Q. Did you go back inside?

A. I never did come outside. I stood in the door. And a few minutes later, he came up to the window and shot in the window.

Q. And where did he hit you?

A. It went into my right side all the way through into my left arm.

Q. Did you see what he did after he shot you?

A. Yes. When I saw him at the window with the gun pointed, I jumped up. I was sitting on the couch. And I jumped up and he shot me. I fell over into another chair. I thought he was going to shoot [149] again. I got scared, and I got up and run down the hall. But I saw him. He ran off.

Q. Where was the friend? Did you see the friend any more that had come to the door?

A. That was his friend.

Q. Did you see him after you were shot?

A. No, I didn't see him.

Q. Did you ever receive any letters from Holly when he was in jail?

A. Yes. I received one from the Pike County Jail and Draper Prison.

Q. Do you remember what they were about?

A. No, I don't remember what they was about.

Q. Let me ask you this: Do you remember whether or not they were in print or in cursive?

A. They was in cursive.

Q. Was Holly pretty—was it pretty easily understood from his letters? Did you understand his letters?

A. Yes, I understood his letters.

Q. Did he convey whatever—I know you don't remember exactly what they said or anything about what they said. But do you remember having any problem understanding them?

A. No, I didn't have any problem understanding.

Q. [150] Did he have a pretty legible handwriting? Could you read it?

A. Yes, ma'am, I could read it.

Q. And once again, I'll just ask you this one more time. Anything ever really strike you as being slow or off about Holly Wood?

A. No.

Q. Would you characterize him as an average man?

A. Yes.

Q. But nothing made bells go off in your head that something was wrong with him other than he had a bad temper?

A. Right.

MS. DANLEI: That's all I have right now, Your Honor.

They're going to have a few questions for you.

MR. HOWLEY: Your Honor, we have no questions for this witness.

MR. JOHNSON: Your Honor, the next witness that the State would call is Dr. Harry McClaren.

HARRY MCCLAREN, PH.D.

was sworn and testified as follows:

DIRECT EXAMINATION

[151] BY MR. JOHNSON:

Q. Could you please state your name for the record?

A. Harry Albert McClaren.

Q. What is your business address, Dr. McClaren?

A. 412 West Washington Street, Chattahoochee, Florida. Correspondence comes to P. 0. Box 522, Chattahoochee, Florida.

Q. Are you presently employed?

A. Yes, I am.

Q. How are you presently employed?

A. I'm in the full-time independent private practice of criminal and forensic psychology.

Q. What is your educational background?

A. I have a bachelor of arts from University of Richmond in psychology 1973. A master of science in clinical psychology from Mississippi State University in 1974. And a Ph.D. from Virginia Tech in clinical psychology in 1981.

Q. Do you have any post-doctoral training?

A. Yes. I was supervised for a minimum of twenty hours a week for a year by a licensed clinical psychologist that had worked for twenty-five or more years for the state hospital, much of it in the forensic service. I working for the service there [152] prior to getting my Ph.D. And after—first time that I worked at Florida State Hospital was between January of 1981 and about October of 1983. After that, I became chief psychologist at Taylor Hardin Secure Medical Facility in Tuscaloosa continuing the work that interests me since my first job in forensics in Virginia.

I worked there examining defendants for the Alabama courts, at times federal courts, put together most of the clinical staff, developed policies and procedures, testified in many courts around Alabama. Did some private practice of psychology at the

University of Alabama, supervised other psychologists at the facility.

Came back to Florida, worked with the Master Security Psychiatry Prison Mental Health Institution at Florida State Hospital. During that time, I taught at Florida State University at the Panama City Campus teaching special students clinical and counseling psychology. I developed a part-time to full-time practice in forensic psychology. I became involved with some police agencies doing fitness for duty evaluations, many times other evaluations for officers who have gone through traumatic experiences. I've worked in area of examining violent criminals in the [153] deep south since 1981.

Q. Do you have any certifications issued by any state agencies?

A. Yes.

Q. So what professional licenses do you hold currently?

A. I have a license to practice in Alabama and Florida.

Q. You briefly covered this, Dr. McClaren, but would you give us a brief rundown of your prior work experience especially as it pertains to mental retardation in particular?

A. Well, the first job that I had after getting a masters degree was as a substitute teacher for a set period of time—I think it was about six weeks—with a school in rural Virginia. There, much like the teachers at Luverne that I interviewed, there was a mix of different kinds of children in that class. Most of them were around twelve years old, as I recollect.

Of course, as I got my first job as a psychologist at the Forensic Unit at Central State Hospital in Petersburg, Virginia, a number of patients that were sent there for study as to their competency to stand

trial turned out to be mentally retarded. I [154] routinely review intelligence scales and all the psychological tests in the process of that work.

At Florida State Hospital, there was a portion of the new patients that were there that were mentally retarded, violent criminals, or people that had been acquitted by reason of insanity or were not competent to stand trial. I've examined numerous individuals in Florida that I recommended to be committed to the mental and retarded defendant program at Florida State Hospital. In fact, my deceased ex-wife was the director of the mentally retarded defendant unit there at the hospital for a number of years, so I lived with someone that knew on a daily basis about the behavior of mentally retarded people. And it was something we would often discuss.

Since, I guess, the last two years, there have been occasions where I have examined people specifically for the issue of mental retardation in Florida and now Alabama. I worked with Dr. Prichard before, both in capital cases be noncapital cases in regard to mental retardation.

I think that captures the kind of work that I have done.

Q. Could you tell us over the course of your career how many clinical evaluations you've conducted [155] approximately?

A. Well over a thousand. It could be multiples of that.

Q. Have you ever testified in court regarding forensic psychological issues?

A. Yes.

Q. Can you estimate how many times you've testified in those cases?

A. Hundreds.

Q. Just for the Court, what is a certified forensic examiner certified to do?

A. To conduct forensic psychological evaluations where psychological assessments has a nexus with the law and where legal decisions must be made based on psychological information. So you go into your evaluation with a goal of helping a court or jury decide an issue that has to do with human behavior, especially abnormal human behavior.

MR. JOHNSON: Your Honor, I would like to show the witness what I have previously marked as State's Exhibit 1.

Q. Dr. McClaren, could you take a look at this and tell me what that is?

A. That is a curriculum vitae. That's my professional background.

Q. [156] Is it an accurate representation of your curriculum vitae?

A. Yes.

MR. JOHNSON: Your Honor, I'd like to move this into evidence as State's Exhibit I.

THE COURT: Admitted.

MR. JOHNSON: Your Honor, at this time, I'd tender Dr. McClaren as an expert in the field of forensic psychology.

THE COURT: Continue.

Q. I would like to direct your attention to the individual seated to your right dressed in a prison outfit. Do you recognize that man?

A. Yes, I do.

Q. Who do you know him to be?

A. Holly Wood.

Q. How do you know Holly Wood?

A. Well, I was contracted by the State of Alabama to do an evaluation of Mr. Wood in regard to whether or not he met the criteria for mental retardation.

Q. Needless to say, no one would expect you to be working for free. So could you explain your fees?

A. Yes. I charge $200 an hour for my time. And there may be more than one person that needs to be [157] evaluated in south Alabama. I believe that there are two that I've been asked to evaluate. And so there's a cap on the services of $20,000.

Q. Now, as an initial matter, could you define mental retardation for this Court?

A. Yes. It's a three pronged test. One is that the person has present limited intellectual functioning in two sets of deviation below the median of the Stanford-Binet that the doctor from the University of Alabama described—the Stanford-Binet 5 or the Wechsler Adult Intelligent 3. One prong is to have this score of about 70 or below. Can be as high as 75. Can be lower. That's one prong. The second is that this limited intellectual development has to be concurrently accompanied by deficits in adaptive behavior ability to meet the demands of independent living, according to the cultured society that you live in. And you have to have two areas of deficits that are—I believe there are eleven of them that are listed in the DSM-IV. And also there must be evidence that the onset of this condition was brought on before the age of eighteen.

For example, someone who experiences a gunshot wound to the head that was an attorney and then their IQ and adaptive functioning was vastly [158] reduced to say an IQ in the 60s and the person couldn't read anymore or couldn't go to the toilet alone or make change, through some traumatic event, that wouldn't be mental retardation.

Q. How did you go about commencing your evaluation of Mr. Holly Wood in this case?

A. I first received a number of documents from your office. It included portions of prior mental health reports from the Alabama Department of Corrections, previous forensic psychological evaluations carried out by Mike D'Errico, who at one time worked with me. I had a contract with the State of Alabama to examine criminal defendants in southeast Alabama.

Very soon after I got the contract, I was busy enough in Florida that Dr. D'Errico started to do most of the evaluations in southeast Alabama. He did it for a number of years. And Holly Wood was one of the people that Dr. D'Errico examined in 1992, after the escape that the officer of the Troy Police Department described.

I also received portions of the court proceedings. It included testimony by Mr. Wood himself, various pleadings that he'd signed. I received the evaluations carried out by Dr. Salekin, [159] who has already testified from the University of Alabama. All the documents are probably too numerous to mention that were sent to me.

I personally examined Mr. Wood on two occasions, one on June 17 of this year for about four hours. And the second for approximately an hour and a half, two hours last night in the Crenshaw County Jail where I talked with him in more detail about the kind of things that he could and couldn't do along with Dr. Prichard. I consulted with Dr. Prichard in regard to his assessment of his adaptive functioning.

I interviewed three correctional officers who were given a skills of independent behavior revised, an adaptive behavior instrument. One was given before by Dr. Prichard. And I gave two more. I was with Dr.

Prichard when we met with the teachers that have testified, Ms. Maddox and Ms. Penn. I, by telephone, talked with Mr. Brown, who is now the principal of the Luverne High School, who had some memory of Mr. Wood at the time. I visited the Johnnie Pearl Wood in her home and was there when Dr. Prichard gave her a Vineland test for adaptive behavior.

I personally gave a Wechsler Intelligent Scale 3 to Mr. Wood, Wide Range Achievement Test, a personality test called the Millon Clinical Multiaxial [160] Inventory III, which is a test of personality and psychopathy to determine whether or not he is showing any signs of anxiety, depression, or mental illness that might affect his scores on tests.

I talked to other people that lived in the community.

Q. Okay. We can take things one by one. Let's first turn to your meeting on June 17 with Mr. Holly Wood. How long did you say that meeting lasted?

A. Approximately four hours.

Q. Who else was present during that meeting?

A. Dr. Prichard was there when the SIBR was given to him. After the behavior on that instrument, Mr. Wood estimated his own adaptive functioning. And later we compared it to the correctional officer who had known him for some time—recalled him. He had only been in Holman Prison for a short time, about a year. And the correctional officers there said they didn't really know him long enough to respond to the test. So we made the decision to go to Donaldson Prison where he had spent approximately eight years and there found three officers that were able to give an adaptive behavior measure.

Q. Could you tell us pretty quickly, Doctor, who Dr. Prichard is in this case and what his role in [161] this case has been?

A. Yes. Dr. Prichard is a licensed psychologist in Florida with whom I have worked on a nonadaptive basis involving mental retardation that were quite important that required testing of adaptive behavior to be given. Recognizing that the death row situation environment is a different one and unique one, often we send—the tests of adaptive functioning are harder to give and interpret. So I [wanted his assistance in this area.

Q. Focussing on the June 17 meeting, Doctor, how did Holly Wood greet you when you first met him?

A. At first he appeared to be rather tense and he was relatively a hard person to get engaged. I probably spent more time with him than I do most people establishing rapport. But once I did, I took a mental status exam, the standard Wechlers, then did the Wide Range Achievement Test and the Millon Personality Assessment.

Q. Could you briefly discuss his behavior during that evaluation? Was he attentive? Was he cooperative?

A. Yes. He became more comfortable as time went on, appeared to become less tense, was able to express to me his sadness about his decisions, the [162] situation. And he did that which I asked of him.

Q. Did he seem interested in the process, actively engaged in the process?

A. Yes. He paid attention. But like I said, he is a hard person to engage, at least to me. But with time, it becomes easier. And, of course, for example, last night when I saw him, I felt that it was a friendly and comfortable exchange with him.

Q. Was he able to follow your instructions on both interviews and complete tasks given to him?

A. Yes.

Q. How with his appearance, Doctor? Could you discuss that?

A. It was normal. He was well groomed, had good hygiene.

Q. What were the conditions of the meeting room at Holman?

A. Well, first, they offered me the visitors part, which has a fan in it. And I had done an evaluation there and it was very hard to hear. I was much younger then and did it. But I asked for a conference room that's nearby, and they put me—arranged for us to move to a place with a better testing area that had a large table, chairs. And it was comfortable and the distractions few.

Q. [163] Let's turn now to discuss Holly Wood's IQ score. Could you tell the Court what test or tests specifically—what you used to address Holly Wood's IQ?

A. Yes. I used the Wechsler Intelligence Scale Roman Numeral III. My test results were pretty consistent with other instruments, precursors to the Wechlers scale and consistent closely with the Sanford-Binet testing. I got a full scale IQ of 64. The true IQ was between 61 and 69. So, you know, there was some scatter in his scores, but not a tremendous amount of scatter.

Q. Let's talk about the Wechsler just itself real quick. Does it go by any other name?

A. Well, the Wechsler Adult Intelligence Scale 3 was a 2.

Q. What does that test measure? What exactly does that test seek to measure, and how does it work so to speak?

A. It has both verbal and nonverbal subtests. And when you administer, you go back and forth. And it seems to make it flow easier than the older versions. And this was consistent with one other Wechsler that I saw given by Dr. Cavenough, who I briefly spoke to.

He gave a Wechsler to Mr. Wood in 1995, and I was able to get copies of his raw data.

Q. I have in my hand what I am now marking State's Exhibit Number 3.

MR. JOHNSON: May I approach the witness, Your Honor?

THE COURT: You may.

Q. Do you recognize that document, Dr. McClaren?

A. Yes, I do.

Q. Could you tell us what that document is?

A. This is a psychological interview data entry form dated February 24, 1995, that gives a summary of Dr. Cavenaugh's test results and his impressions of Mr. Wood.

Q. What were the findings of Dr. Cavenaugh?

A. Full scale IQ of 69, and he had a 46 MMPI profile, indicating on scale 4 to 6 paranoia, which is the level that it was on the profile which suggested more suspiciousness and anger than paranoia. He went on to say that Mr. Wood admitted to use of alcohol, denied the use of illicit drugs. Admitted alcohol use was in remission due to controlled environment, thought he has antisocial personality disorder. His remarks were full scale IQ of 69 is lowered due to possible LD, which I believe stands for learning [165] disabilities, and barely adequate motivation; my impression is that he functions higher than mild MR, probably in the borderline range.

Q. Thank you, Doctor. Now, going back to the Wechsler, is the Wechsler test a test accepted within the mental retardation—the psychology and psychiatry community?

A. Yes.

Q. So, again, during your evaluation of Mr. Holly Wood's tests, did you consider his prior IQ scores?

A. Yes.

Q. And were the IQ scores consistent over the course of however many years?

A. Yes. Most of the them hovered been 3 to 6 points of that standard deviation from, I believe, of a hundred.

Q. Let's turn to a different topic. Did you consider Holly Wood—did you perform a test known as the Millon?

A. Yes.

Q. What did the Millon test show?

A. It's a test that does two basic things; one, it gives you an idea of the person's test taking approach; and if the person is tending to demonstrate [166] taking the test one way or the other to make themselves better, more softer. It also gives indications of response that maybe inconsistent with different mental scores. The test was valid in my view, but it shows a tendency for him to present himself in a more favorable light as. It also indicated anxiety and depression were elevated to the extent that he probably had some aspects of an anxiety disorder or depressing disorder, but not to the extent that it was definite. Of course, I was aware that he was perceived by the Department of Corrections as suffering from a depressive disorder, not always classified, and was taken amitriptyline, which is an antidepressant medication, and had been treated with other drugs in the past

Q. Did you conclude based on this test or any other tests that you performed whether Holly Wood has antisocial personalities disorder?

A. Yes. The diagnosis of antisocial personality disorder is largely made by history. Personally I think it's a human behavior that goes throw slow rates of changing throughout life. And during my conversation with him last night, he told me of before

age fifteen some behavior that would be some [167] evidence of a conduct disorder starting before the age of fifteen. And briefly, finding heavy equipment, bull dozers that the city might leave at the highway with the keys in them or that you could push a button and start them and talked about some of—learning to operate these pieces of equipment as a young boy. So there was some evidence of conduct disorder directly from him.

Q. So would you say that he fits into the diagnosis of antisocial personality disorders?

A. Yes.

Q. Now, turn to the issue of adaptive functioning. Did you test Holly Wood's adaptive functioning?

A. Yes.

Q. What test did you use specifically to evaluate that prong of your mental retardation diagnosis?

A. Well, both the SIBR and we used the Vineland classroom edition for the teachers. Now, keep in mind that these tests attempt to examine someone who would be a good respondent who has present knowledge of a person. The SIBR allows for estimation by people that know the person well and also allows the test to be administered to the person himself. And if you have [168] some doubts, you might get the person to demonstrate. For example, when we were interacting with him in Holman Prison, one of the questions was having to be able to tell time with the clock. And Dr. Prichard asked him to give the time and then to set a watch. And he was able to do this.

Q. Have you ever used a test called the AMR test?

A. Yes.

Q. What exactly is that test?

A. It's one of three commonly given tests of adaptive behavior. They're designed to estimate current adaptive functioning.

Q. Did you use that test in this case?

A. No.

Q. Why not?

A. Because it didn't allow for separating, and it did not allow for estimation in the sense that the SIBR did. You had to be absolutely sure that a person who had performed a task to do an estimation on that test, so I chose not to use it.

Q. Is that the test, Dr. McClaren, where you compare a person to a group of mentally retarded people?

A. No. It's compared to normal people.

Q. [169] That's compared to normal people?

A. Yes.

Q. Which test is the test that, I believe, Dr. Salekin used, where you compare the people to a group of mentally retarded people?

A. That's AMR.

Q. Are there any problems in your professional expertise to such a test where you compare an individual to a group of mentally retarded people?

A. Well, in the death row environment, which is a atypical environment, people can't do things and that will give them a score of 0, like the Vineland or AMR test. And for that reason, the SIBR was used. And we felt that correctional officers that had current information about Mr. Wood would be a better pool of informants than people who hadn't seen him for ten or twenty years in any manner.

Q. Before we get to those individuals, can we briefly discuss his employment records? During the course of your investigate or evaluation of Mr. Holly Wood, did you review any of his employment records?

A. Yes.

Q. Which employment records did you review?

A. I reviewed the Pepsi Cola Company in Luverne employment records.

Q. [170] With respect to the Pepsi Cola records, is there anything in particular that you remember learning about his work there?

A. Well, he apparently started looking for a job there at about 15 and apparently worked for them—I couldn't tell whether he came and went, but over a couple of year period. I think he stopped in 1978 from that employment and started trying to get a job there in 1976 before his birthday July 4th.

Q. Can mentally retarded individuals operate machinery like a forklift and front-end loaders?

A. I can't think of another mentally retarded person I have examined that did that kind of work.

Q. During your evaluation of Holly Wood's adaptive behavior, did you have occasion to speak with or interview other people who knew Mr. Holly Wood?

A. Yes.

Q. About how many people approximately did you interview in connection with this matter?

A. Teachers, boss, correctional officers, a man that had known his family, sisters.

Q. How many Vineland tests did you conduct in this case?

A. Well, along with Dr. Prichard, there were two teachers editions given. Again, it is a hard [171] thing to go back. But if attempting objective tests, retrospectively is better in our view than not. So two teachers; Ms. Maddox, Ms. Penn; Johnnie Pearl, Maeola Wood; and then three—well, three correctional officers completed SIBRs, and Mr. Wood completed a SIBR himself.

Q. Would evaluating an individual's adaptive personal functioning—how important is it to you to evaluate persons who knew the person being evaluated?

A. I think it's very important especially if you're doing the evaluation not in the usual way that these

tests were designed to be used. Because different people see people at different points in their live and in different contexts and some people may have bias. And, of course, people change their behavior in different situations.

Q. So would you say it is better to interview one person or two people who knew the individual well, or is it better to interview a variety of people who knew the subject at different points in that subject's life?

A. Over many years, I've learned that it's better to interview as many people as you can that know the person well because different people will see different parts of a person's behavior. And I think [172] that's pretty much common sense.

Q. Doctor, if you assume that someone who knew the subject thirty years ago produced a score on a Vineland test in the 60s but people who knew the subject more recently produced a Vineland score in the 80s or 90s, would that difference indicate anything to you in particular?

A. It would make me have the hypothesis that the person's adaptive functioning was likely better now than it was then. But, again, I'll have to take into consideration one would be now and one would be retrospective.

Q. Let's briefly discuss—you interviewed Holly Wood himself; is that correct?

A. Yes.

Q. What have you learned about him specifically through your interviews with him?

A. In a nutshell—

Q. Let's focus, for example, on his job abilities and his hobbies.

A. Well, he has been able to obtain and maintain a variety of jobs involving driving motor vehicles, working in a factory, working heavy equipment. He

has worked while in prison in the kitchen, not as a cook, but as a person that helps [173] prepare foods. He tells me that he's worked at pulp wood, which is another occupation where heavy pieces of lumber are moved by heavy machinery with dangers. So he's had a number of jobs that required a degree of skill that is not typically associated with people who might experience—that are mentally retarded.

Q. Are you aware, for example, if he can cook—if Holly Wood is able to cook?

A. Yes. We talked about that last night. For example, we asked what's your favorite food. And he said, well, I like home cooking. I said like what. Well, greens and okra and peas and corn. Okay, how do you do that. Well, you get the pot and put water in it and put them in, put some neck bones in, and then boil it. And how long do you cook it. Until it's done. Okay.

So we talked about the family starting out with a wood stove then getting an electric stove. Talked about cooking steak, cooking pork chops. He told me he could certainly prepare a meal for a number of people and was able to describe how to cook pork chops, steak, greens, okra, corn, peas, these sorts of things.

Q. Did you learn anything about Holly Wood's ability to drive a car?

A. [174] Yes.

Q. What did you learn?

A. He told me that he initially got a driver's license starting out with—I guess it was like a learner's permit in Alabama—for about a year when he was about fifteen and then getting a regular driver's license, having numerous cars in his life, paying cash for most of them, but some on credit. Talked about traveling in automobiles and buses. In fact, gave me directions on how to get to Fort Walton where he told me about his selection of motels in Fort Walton when

he'd go there with a girl. 331 to Crestview to Fort Walton. And that's pretty much how you get there.

Q. Did you learn anything about the incident in 1991 with Officer Everage?

A. Yes. I heard his side of the story.

Q. What exactly was the substance of that conversation?

A. Well, he got pulled. And there were two—

MR. HOWLEY: Objection, Your Honor. This is not in evidence. We do have in evidence the officer who was there.

THE COURT: When you say the substance of that conversation, as between who and who? Everage?

MR. HOWLEY: [175] Yes, sir. Between the doctor during his evaluation and investigation of Holly Wood.

THE COURT: Sustained.

Q. Did you learn anything else about Holly Wood's hobbies—anything else Holly Wood might have enjoyed doing?

A. Well, he said he liked hot nodding. And he talked in an animated way. In fact, the most animated I had seen him about some powerful engines from the sixties in classic cars that he once owned and how much he liked them. And told me that that was one of his hobbies. In fact, he subscribed to Hot Rod magazine that was delivered to him.

Q. Did you have occasion to speak with any of his family members directly?

A. Yes.

Q. Which family members were those?

A. At some length with Johnnie Pearl when she was getting the Vineland, introducing myself. Not only when she did the Vineland, but she talked about issues in the home.

Q. What were the results of that Vineland, Dr. McClaren?

A. Seems to me that it had a IQ equivalent in the 40s.

Q. [176] What would an IQ equivalent in the 40s indicate to you?

A. Very low, moderate to severe mental retardation, like a young child.

Q. Is there an age equivalency with an IQ equivalent of around 41 or 42?

A. I would estimate around three or four years old.

Q. Have you seen any evidence to indicate that Holly Wood functions at the level of a three or four year old?

A. No.

Q. Did you speak with any other family members?

A. Briefly to Maeola Wood. As it turned out on the way up here, on the trip where we first went to Donaldson, there was a family reunion. And I spoke to Maeola when I called Johnnie Pearl's house to speak with her. And she was telling me about the family reunion and she was very eager to get there. I decided not to attend with Dr. Prichard, but entertained the idea for a while, but did not go. But I did not have a substantial conversation with her. Later Dr. Prichard was able to give her a Vineland via telephone.

Q. Let's switch topics real quick. Did you [177] have occasion to meet with officials from the Alabama Department of Corrections?

A. Yes.

Q. Where did you meet with those individuals?

A. In both Holman Prison and Donaldson.

Q. Did you administer any Vineland tests to any of these individuals?

A. No.

Q. Not to any of the—

A. Correctional officers.

Q. To the correctional officers?

A. Not to correctional officers. SIBR.

Q. Which tests exactly did you administer to them?

A. SIBR.

Q. What did you learn during the course of your interview with Officer Cargill?

A. I don't have the test up here with me. But I do recall that all the correctional officers that we completed adaptive assessments on rated him outside of the mentally retarded range.

Q. Which officers were those again? Do you remember their names?

A. Cargill—Sergeant Cargill, Ryans, and Witherspoon.

Q. [178] And what was their ultimate finding—your finding based on what they told you?

A. Well, that the—Officer Witherspoon had about an estimate of 117, which seemed kind of high to me; that Sergeant Ryan was in the 90s based on memory; and that Cargill was in the 80s. And Mr. Wood himself rated himself in the 90s.

Q. Okay. Doctor, I would like to ask you briefly some questions about Holly Wood's various abilities on the levels in the Adaptive Functioning 2 out of—9 or 2 out of 11 Test. With respect to his self-care abilities, did you find evidence that he can groom himself?

A. Yes. Everyone that I spoke to said that he was neat and clean in his appearance.

Q. Is he capable of sewing or repairing his clothing items or at least taking them to the laundry?

A. Yes. The officer told me that when laundry time came that he turned in his laundry and had it

done, and there was maybe some left over that he'd have to do himself.

Q. Does he pay attention to his nails and to his hair?

A. Yes.

MR. HOWLEY: Judge, I object to the [179] foundation of these questions. It appears that all of these answers are based on things that are not in evidence and therefore cannot be the basis for this expert's opinion.

MR. JOHNSON: Your Honor, this is the basis of his opinion as to—I mean, these answers are from his evaluation of Mr. Holly Wood in this case. And they form the basis of his ultimate opinion just as the same happened with Dr. Salekin.

MR. HOWLEY: I think there's a difference with Dr. Salekin in that we admitted the things she relied upon. And I would cite to the case Mason against State and ex parte Harvey—I'm sorry—ex parte Ronald Harvey Wesley where it appears this particular witness—his testimony was deemed inadmissible on appeal because he relied on facts that were not in evidence.

MR. JOHNSON: Your Honor, that's entirely a different situation. We're not talking about other cases. We're talking about the matter at issue before this Court. And he's basing his opinions directly on his findings, his experiences, his interviews, and evaluations with Holly Wood and so forth. This is appropriate proper evidence in this case. Moreover, we were not required as we litigated last week to turn [180] over any of this evidence until Friday, which we did. We complied with this Court's order. It is perfectly proper in many cases—and I can cite you

many cases—in which the expert witness does not prepare an expert's psychological report. In fact, two of their expert witnesses who we thought were testifying up until Thursday didn't prepare expert psychological reports. So that is not the—

MR. HOWLEY: Judge, this has nothing to do with the preparation of an expert's report. The fact that two people who are not testifying here did not prepare expert reports is completely irrelevant. They didn't testify here. They're not trying to put their opinions in evidence. This man is trying to put his opinions in evidence. As you well know, Judge, in some jurisdictions, it is permissible for an expert to rely on facts that are not in evidence. Alabama takes a different view and has taken a different view with this witness, reversing courts that have allowed his testimony in when the facts were not in evidence.

MR. JOHNSON: Your Honor, if we could have maybe five minutes to review the rules of evidence and rules of procedure and also case law.

THE COURT: We've been going almost two hours, let's take a ten-minute recess.

[181] (A short recess was had in the proceeding.)

THE COURT: Any further argument?

MS. DANLEI: Just for clarification, if we could have counsel restate the objection, I'm a little bit unclear. The question that Dr. McClaren answered that prompted the objection, I believe, had to do with Mr. Wood's own assessment of his—from the scoring of his—I can't think of the name of the test. But if you could for me so I can argue a little bit better here.

MR. HOWLEY: Well, I objected to this witness testifying based on facts that are not in evidence, based on hearsay.

MS. DANLEI: I would assume this whole report from your expert is also inadmissible according to her record telephone conversation with Brady Mills, attorney; Jessica Hodkinson, attorney; Hilda Maddox —of course, she did testify. Charles Sport did not. Johnnie Pearl Wood has not testified.

MR. HOWLEY: Actually, Your Honor, Johnnie Pearl Wood has testified prior in these proceedings, and that's what she said she relied upon. And, also, if I may finish, I haven't objected when they have had this witness testify based on the Vineland reports, for example. And I forget the other one. Is it [182] SIBR? And there's a reason for this distinction.

As you know, Your Honor, in Rule 32 proceedings on the issue of mitigation—and a lot of what we're dealing with here today goes to mitigation—hearsay is acceptable if there is sufficient evidence of reliability. And the position I've taken and the way I've made my objections is where he's got a written report from somebody else where he administered a test or process and he got that person to write down their answers that might fit within the hearsay—the modified hearsay rule for Rule 32 proceedings that go to mitigation. And I have not objected to him testifying on that.

But where he just reports what he has heard where he had full opportunity to do those types of reports where, in fact, he has done those reports with Mr. Wood and with others and but now he's adding to those, I don't think there's any assurances of reliability there, Judge.

He's an expert. He's done this thousands of times. He knows how to get the information. He's been reversed at least twice on this grounds, so he knows that he has to get it in writing so it can be admitted in evidence so he can rely on it. And now he's coming in and saying, well, I didn't get it in [183] writing, I didn't do a report, but just me, I'm going to tell you, I don't think that fits within the exception to hearsay in Rule 32 proceedings.

I've only made two objections here, Your Honor. The first one has been sustained. This one is due to be. What he is telling us that isn't in any piece of writing, that isn't admitted in evidence elsewhere, that isn't in the record, that's what my objection is to what he's testifying to that he hasn't put in evidence.

MS. DANLEI: Well, several points. First of all, he mentioned the testimony of Johnnie Pearl, which I believe your expert testified on the stand was completely inconsistent with—well, not completely, but on point inconsistent from prior proceedings. So in effect, the information she's now relied on in her report was not, in fact, anything that this—

MR. HOWLEY: That—

MS. DANLEI: Excuse me, can I finish?

MR. HOWLEY: The record will speak for itself on that one.

MS. DANLEI: Secondly, the cases appear to—that he relies on are both cases of testimony during the guilt phase of the trial. In this case that I read—because, of course, they don't have the [184] cases that he's relying on—he presented testimony from police reports from—I believe one of them was hospital records.

And like I said, I don't have the cases, but completely different posture than where we are today.

And I think customarily the practice of psychologists is to conduct themselves as both of these have. They interview as many people as they possibly can whether they make a report or not. They're not required to. So, you know, the cases relied on are a completely different posture than where we are today. We are here on the ultimate issue of whether or not he's mentally retarded. And we're not before a jury.

THE COURT: Anything further? Overruled.

Q. Dr. McClaren, I just have a few more questions for you. Are you familiar with the report prepared in this case by Dr. Salekin?

A. Yes, I read it.

Q. Can you tell this Court whether you agree with the substance of her findings?

A. I don't agree with the bottom line, which is that Mr. Wood is mentally retarded.

Q. Why do you not agree with that bottom line finding?

A. [185] In my opinion, that behavior is higher than I would expect for a person who would be legitimately diagnosable as mentally retarded. His IQ undoubtedly is within the range that meets that form of the diagnosis of mental retardation. There is some indication that he was placed in a program in the Crenshaw County School that was called educable mentally retarded. But it was also true that the same criteria in regard to placement that is in existence nowadays was not in effect at that time. But that's not where the main difference is. It's in the adaptive behavior realm.

Q. So based on your expert experience and based on your evaluation of Mr. Holly Wood, what is your finding with respect to Mr. Holly Wood's adaptive functioning?

A. That he functions at a higher level than a mentally retarded person—mildly mentally retarded person.

Q. Upon what do you base that finding?

A. On all areas except functional academics.

Q. Is there anything in particular upon which you base that finding?

A. Based on everything that I have read in official records, documents that have been generated [186] and submitted by the Department of Corrections, in the State of Alabama psychological evaluation, my license in psychology, and my own evaluations of Mr. Wood.

Q. Did you find anything to support a finding that he has adaptive functioning score in the 40s or 50s?

A. No. That can't be true.

Q. Did you find anything in the evidence to suggest that he functions at the level of a three year old and needs constant care?

A. No. I would say that his functional academics are very low, like second to fourth grade level. That, I believe, is an area that he functions in the mentally retarded range.

Q. Did you determine where he does fall if not in the 40s or 50s? Did you make a finding based on that?

A. On the WRAT 3 he had 68—spelling 62 and arithmetic at 55, so there's objective evidence that his functional academic skills fall within that.

Q. But in terms of the other factors under adaptive functioning, your finding is—

A. They do not.

MR. JOHNSON: Thank you, Dr. McClaren. No more questions at this point.

[508] CROSS EXAMINATION

BY MR. HOWLEY:

Q. Dr. McClaren, I may jump around a bit. And if I do and I confuse you, just let me know and I'll try to put things in context.

Let me see if I understand that your main disagreement with the conclusion reached by Dr. Salekin has to deal with the adaptive functioning; is that correct?

A. Yes.

Q. Do you have any opinion as to—is it your opinion that Mr. Wood's IQ level falls within the range of mentally retarded, the first prong?

A. Absolutely.

Q. Do you have any opinion whether that aspect had an onset before eighteen?

A. I believe that it most likely did.

Q. When you—well, let me ask you about the SIBR. And that stands for Scales of Independent Behavior Revised; is that correct?

A. Absolutely.

Q. Now, did you administer a SIBR to someone named Willie Ryans?

A. Yes.

Q. And who is he?

A. [188] He was a correctional officer that knew Holly Wood during his entire time at Donaldson Prison according to his report to me.

Q. And approximately how many years was that?

A. Approximately eight.

Q. And Mr. Ryans found that Mr. Wood has limitations in seven adaptive skill areas; is that correct?

A. He had some limitation in adaptive skills, yes.

Q. Do you recall that there were seven different areas where he had some limitation?

A. I don't recall the specific ones as scored by the SIBR. No, I don't recall the specific ones.

Q. But would you remember language comprehension was one?

A. Like I said, without looking at the report—

Q. You don't have any recollection?

A. I read the report. And as I said, I consulted with Dr. Prichard to do the objective assessment of adaptive behavior. I focussed on the intelligence testing and from endeavouring to talk to as many different people who knew him in different contexts and different times and left the assessment [189] of the adaptive behavior via instrument to Dr. Prichard.

Q. So did you personally make any assessments of Mr. Wood's adaptive behavior?

A. Based on judgment, yes, I did. In consultation with Dr. Prichard, my understanding was that the totality of the evidence was that the adaptive behavior measures did not support that his adaptive behavior caused two of the areas to fall so low as to justify a diagnosis of mental retardation.

Q. When you say caused them to fall so low, what criteria are you using to set the bar at so low? How do you judge so low?

A. In the two standing deviation median. That's how I'm thinking about it together with observation of people that have known him recently and in the past describing his behavior.

Q. Now, you were shown before the State's Exhibit 3, which was the 1995 data entry form. Do you recall that?

A. Yes.

Q. Do you still have it up there?

A. I'm not sure what happened to it.

Q. There's a notation there that you testified about something to the effect of possible LD, barely [190] adequate motivation. Could you read that for us?

A. FS IQ 69 is lower due to possible LD and barely adequate motivation. It is my impression that he functions higher than mild MR, probably in the borderline range.

Q. Now, you testified that you thought LD might refer to learning disabilities; is that correct?

A. Yes.

Q. And is that based on your guessing from the letters L-D, or do you have any other basis for making that assumption?

A. I suspected that he had learning disabilities based on his difficulty in school and his placement in a rather ill-defined special education curriculum. I tried my best to find out what the criteria was and couldn't do it. But it was my impression that this man has learning disabilities that make it hard for him to learn academics.

Q. And what specific learning disabilities do you think he has?

A. Apparently with reading, spelling, arithmetic. He scored very poorly on those; yet when you look at many, many requests, things that are written by Mr. Wood, it is understandable. Many words are misspelled phonetically. It is understandable. [191] People that have been around him that I interviewed, correctional officers, tell me that they don't have any problems communicating with him and he's able to get his needs met both verbally and via written language. And I also appreciate the cultural effect that's at work where you have to consider the cultural context. This man growing up in a very difficult social environment with the support lacking that many children have, that if they have these disabilities they can get

tutoring, placement in an enriched environment. And he's also had insults to him from a motor vehicle accident and maybe been exposed to beverage alcohol in utero. I don't know that for sure, but that is possible.

Q. What evidence are you relying on when you say there may have been an insult from a motor vehicle accident?

A. Through the report of Mr. Wood and a report from Johnnie Pearl of the death of his brother, that very much affected him, and where he was rendered unconscious. If this is true, this could explain how he came to have difficulties learning. If he was exposed to beverage alcohol in utero, that could be another insult. It is true that he grew up in the environment that I understand that he did. The social [192] environment then could adversely affect him achieving his potential with the brains that he was born with.

Q. I think you said that the correctional officers on death row have seen him in a very atypical environment to social context. Do you believe that?

A. Yes.

Q. In that atypical environment or social context, does Mr. Wood have any occasion to call a repair service or a landlord if something major such as a furnace or refrigerator breaks down?

A. Well, of course not directly. But when an officer said to me that he tells us when something is broken and needs fixing and I believe that could—that it is not a big leap to think that if something is broken in his home that he would know to do something about it.

For example, last night, I talked to him about what do you do when the lights go off in your house when it's not storming. He said, well, you go to the fuse box. Well, what if the circuit breaker is thrown, what do you do. Turn it back and forth, lights come on sometime.

And what about those fuses. You look at them, sometimes they're burned, they're blown out, these kind of things. That shows me adaptive behavior.

Q. [193] Do you know of anyone who has—anyone told you that they've actually seen him or experienced him calling to make repairs on something like a furnace or refrigerator?

A. No.

Q. Do you make any distinction between knowing how to do something and actually doing it?

A. Yes.

Q. Going back to this atypical environment on death row, do you think there's any occasion for Mr. Wood to talk to a corrections officer about the terms of an installment purchase agreement?

A. No. However, he told me before about on one occasion borrowing money along with his dad from a bank to buy a car, but he preferred to pay cash. The record that I read there was discussion, I believe, by Johnnie Pearl of him buying—usually buying cars with cash but on one occasion borrowing $200 for the car but quickly paid for it so that he could do things for the family. That's adaptive behavior. And it's parallel like an installment agreement.

Q. On death row, is there any occasion for Mr. Wood to plan and prepare meals regularly for himself and his family?

A. Of course not. But when I talked to Mr. [194] Wood about cooking, we had a conversation about how to cook several kinds of food that he tells me he knows how to cook. He describes how to cook greens, steak, pork chops, put seasoning on them, put neck bones in them to flavor them. That's adaptive behavior.

Q. And this is based on your conversation with Mr. Wood last night?

A. Yes.

Q. So after you went through and you did the Vinelands and you did the SIBRs and you got from people what their assessments were of what Mr. Wood could do, you then went and talked to Mr. Wood about it?

A. Yes.

Q. Isn't that what you did last night?

A. Yes.

Q. Do you have any idea what choices Mr. Wood has on death row in terms of color and pattern of clothing?

A. At this point, of course, he has to wear a prison uniform. However, I hope you won't—I'm not in any way doing anything wrong in evidence. But if I am told that he was a very sharp dresser by more than one person that knew him well, it makes me think that if he was set free and given $500 and went to the mall [195] where he could buy clothes that he wanted, he would be able to put together a very nice outfit for himself.

Q. Well, when a corrections officer tells you that he always or almost always without being asked dresses neatly and selects clothes that go together with regard to color and pattern, do you have any reason to question the reliability of the correction officer's report with respect to color and pattern when Mr. Wood can only wear white?

A. Yes. I would think that the conversation—I'm not sure if it was with Cargill. But one of the officers that I interviewed, we talked about how inmates at Donaldson—there's only twenty-four inmates on their death row unlike Holman where there's many more—figured out how to press their nicest whites—there's one pair of whites that the guys try to keep nice like for visiting. And there's a way to put them under the bed and press it so it looks as if it's been pressed with an iron. So someone who knows the ecology of where

a person lives and explains something like that, that gives weight to me.

Q. But it doesn't tell you that they know anything about his ability to choose color and pattern?

A. Not from that source completely. That's [196] part of it. But I have more than one source that tells me that when free he was a very sharp dresser, shoes, clothes. Ms. Siler, her testimony earlier said he dressed nice, clean, nice hair.

Q. Is it inconceivable to you that a person with mental retardation could dress nice?

A. No. I examined a man within the last six months —young man that came from wealthy parents was wearing a Nautica knit shirt, some tasteful jeans, but was charged with lewd and lascivious behavior.

Q. And was he mentally retarded?

A. Yes.

Q. Is it inconceivable to you that a mentally retarded person could drive a motor vehicle?

A. No. Some obviously can.

Q. How about obtain a driver's license? Can a mentally retarded person do that?

A. I would think that some can. I believe that—however, I believe that if you were to take those people of age that are mentally retarded in the United States, which is the—approximately the bottom two and a half percent of the population, if we're going just with IQ and there's maybe about 300 million people, so two and a half percent is what? Seven and a half million of those mentally retarded people, some [197] of them must drive. Now, how many drive bull dozers, I don't know.

Q. Do you have any evidence Mr. Wood has driven a bull dozer?

A. He told me that he had. And I heard evidence that he showed the ability to drive a forklift. Now, a

forklift is not as complicated as a bull dozer, but they are both machines that have to be manipulated forward, backward, side to side using controls. And, again, thinking about that seven and a half million Americans that are probably mentally retarded, some of them probably can do that.

Q. Other than what you heard from Mr. Wood last night, do you have any other reason to believe that he's ever driven a bull dozer?

A. No.

Q. And other than what you heard in court this morning, do you have any other facts—knowledge of any other facts about the forklift that Mr. Wood drove at the lead plant?

A. No. But I do have reliable information that he drove a motor vehicle, truck, had cars, worked on cars. So it doesn't seem like it's a big leap.

Q. So in your mind, it's not a big leap from driving a car to driving a forklift?

A. [198] Not a big one. It's kind of like the leap between driving a car and driving a riding lawn mower maybe that has different controls than the steering wheel.

Q. Do you know if the forklift had a different control than a steering wheel?

A. No. I don't know what make, model, or controls.

Q. So for all you know, it could have had a steering wheel?

A. And probably had controls as well.

Q. Do you know what other controls it had?

A. No. I don't know the make, model, what forklift that he drove.

Q. Now, did you receive a copy of Dr. Salekin's report produced here today?

A. Yes.

Q. About how long ago did you get it?

A. About six months, I believe, or maybe eight weeks.

Q. I'm not sure it's that old. Could it have been a week or two ago?

A. Could it have been—it seems like it came the second or third delivery.

Q. And you've had a chance to review it; is [199] that right?

A. Yes, sir.

Q. Turn to Appendix C of that report, which is page 15. Are you familiar with this ABS-RC2?

A. I own a test kit. I have read the instructions. I have never personally given this instrument, but it is one that I'm aware of and may give in certain situations in the future.

Q. I'm sorry, in certain situation you might use this?

A. I might use this in the future, yes.

Q. Did you in the course of your evaluation and investigation here come up with any evidence that Mr. Wood has deficits in what is noted here under Roman Numeral VI, domestic activity?

A. No.

Q. Do you recall that your SIBR on Willie Ryans at Donaldson Prison in the summary listed domestic skills as one of Mr. Wood's deficits?

A. Again, without looking at the printout, I'm not sure. But it may be. But keep in mind that these adaptive measures are tools to measure something called a hypothetical construct, which is not something that's real. But it is some construct in the minds of men that is useful to describe nature. [200] And just because a computer printout suggests this, it doesn't make it true because what's being measured is not real.

Q. So you did this SIBR on Mr. Ryans and you got the printout, but you didn't deem that to be a true result?

A. I thought based on the information that I had that his ability to clean and cook and take care of things around the house appeared normal to me.

Q. And what are you relying on? Do you have any SIBRs that say that his cleaning the kitchen and other domestic duties were normal?

A. No. I have him describing to me things that he did. I have correctional officers telling me that he is a, quote, neat freak and one of the neatest guys they see, about keeping his cell neat, taking out the trash, making sure that it's good, that he's clean, and this sort of thing. So that makes me think that he's able to do these things well, to adapt in this manner.

Q. So on the one hand, you have Mr. Ryan saying that he cannot, but you ignored what Mr. Ryan said because the prison guards—the corrections officers told you that he could keep his cell neat on death row? Is that what happened here?

A. [201] In conjunction with him describing to me sweeping, washing clothes, cooking, hearing Ms. Siler tell me he could do these things makes me think that his ability to adapt with the independent means of living is not significantly impaired.

Q. Just so I'm clear, so it's the corrections officers telling you what he can do on death row and your conversation with him last night that led you to ignore what was the result of the Willie Ryans SIBR?

A. What the printout from the computer suggested—I have read enough computer generated interpretation of psychological tests to remind me when I was going to graduate school that psychological tests give you hypotheses about human behavior. They are measuring things for the most part not

physiological things but things like intelligence, things like adaptive behavior that are hypothetical constructs, not real things, tangible things.

Q. Let me mark as Petitioner's 25 a document that was produced to us on Friday. It says report of Adaptive Behavior Testing, examiner H. McClaren. Dr. McClaren, can you tell us what Petitioner's 25 is?

A. Yes. This is a report of adaptive behavior from Holly Wood done by me on July 29, 2003.

Q. And what does it mean where it says [202] respondent? Who was that identifying?

A. Willie Ryans.

Q. And what does it mean when it says examiner and has your name there?

A. That means I was the person that questioned the respondent.

Q. And how is this SIBR administered? Do you ask questions of the respondent?

A. First read it to the person and let him know that I'm going to be asking questions about what the person can and cannot do. And then in a nonstilted manner read from the manual and explain what I'm going to do and basically going to name some tasks, explain the rules that I want him to use. And he has four choices that he can point to.

Q. And is some sort of form completed out?

A. Yes.

Q. And who actually completes the form?

A. The examiner.

Q. And that would be you in this case with Mr. Ryan; is that right?

A. Yes.

Q. And then what happens to that form? What do you do with that form?

A. Then the company that markets the SIBR [203] devises a computerized interpretation and a

narrative that is used typically for treatment planning to help assess often children. But the SIBR can be used in adults to plan rehabilitative activities for the person. And it tries to direct someone who's going to treat this person into the areas that need the most attention. So that's like a utilitarian approach to why you use something like that and why generate a report like this. But what I'm getting at is psychological tests nowadays can be scored by a computer and narratives can be generated, but just because this narrative is generated doesn't make it true. I can remember any number of examples where the psychological tests gave me hypothesis about people that turned out not to be true.

Q. Then what is the value of this test?

A. Hypotheses to be checked out against other information that you have. And that's what most psychological tests caution that you do.

Q. Can you tell us what hypotheses this report came up to in terms of limitations in adaptive skill areas?

A. Holly's broad independence is comparable to that of the average individual at age 17 11 months. His functional independence is limited to age [204] appropriate. When presented with age level tasks Holly's motor skills are age appropriate. His social interaction and communication skills and personal living skills are limited to age appropriate. Holly's community living skills are not limited. Holly has limitations in seven adaptive skill areas; language comprehension, eating and meal preparation, domestic skills, time and punctuality, money and value, work skills, and home community orientation.

This sounds rather definitive.

Q. I'm sorry?

A. This sounds rather definitive. But you have to keep in mind that psychological tests give hypotheses about human behavior that get checked out with other sources. And when you get convergent validity, you have more confidence in your results. You don't simply read narratives and say okay.

MR. HOWLEY: I'd like to move 25 into evidence.

MR. JOHNSON: No objection.

THE COURT: Admitted.

Q. Let me ask you about antisocial personality disorders. Is that the correct term?

A. Yes, sir.

Q. Are antisocial personality disorder and [205] mental retardation mutually exclusive?

A. No.

Q. So a person who was mentally retarded can also have antisocial personality disorders?

A. Like everybody else, some of them have personality disorders. And some of them have antisocial personality disorders.

At the grounds of Florida State Hospital, there's a rather large maximum security building that is filled with people that are mentally retarded that also meet the criteria of antisocial personality disorder.

Q. And is it true that antisocial personality disorder is a fairly stable trait?

A. Well, like I said, the diagnosis is largely historical. I suppose it's within the realm of possibility that someone could change. But I'd really have to look at the post 18 parts. Because once you have the threshold of some evidence of a conduct disorder before 15—some of these other things, once you have done them, you have done them, then it's part of your history. And while you may have less of these like

you might learn to experience empathy and remorse —I don't recall all the post 18, post 15 criteria. But some of them might change.

Q. [206] Is there an age of onset for antisocial personality disorder?

A. At least eighteen. I believe that's correct.

Q. I'm sorry? Is that onset before eighteen?

A. Well, the conduct disorder—has to be evidence of a conduct disorder before fifteen, so that's criteria A.

Q. And what evidence constitutes a conduct disorder?

A. In regard to Mr. Wood?

Q. No. I'm asking about when you say evidence of a conduct disorder before fifteen, I'm trying to get what the standard is or the frame work is, the analytical frame work of this. What types of things do you look at before age fifteen to determine whether somebody has antisocial personality disorder?

A. Things like lying, cheating, stealing violating people's rights, fighting, getting suspended from school. There's a long list of—a lot of things that are possible criteria for making the diagnosis of—conduct in school.

Q. So identified fighting in school before the age of fifteen at school might be one of the things that might suggest antisocial personality disorder?

A. [207] Right. I might note, for example, that a person was in repeated fights in school and so that would be some evidence of a conduct disorder. And in some cases I might have access to juvenile justice files and the person has got almost all of them, and I've got the police reports and I've got the victims to talk to, so I know in these cases that the person had been formally diagnosed with one. And since we don't have records of this in Holly Wood's case, school and juvenile records. The Alabama Probation and Parole Department considers these records to be confiden-

tial. Most juvenile justice records are confidential. I might not know things that may have happened, but I do know that Holly tells me that before he was fifteen that he would act misappropriate, crank up heavy equipment that was left at the side of the road by the highway department. So he's telling me something about himself and certainly it's not—he's not telling me every antisocial act that he may have done before he was fifteen, but he is telling me some evidence of that. And then I see that this doesn't.

Q. Well, I asked you before fifteen. And what you've got before fifteen is Mr. Wood, what he told you last night; is that correct?

A. [208] That's one specific thing that I have that I recall.

Q. And were you here this morning when the two teachers—the two special education teachers testified?

A. Yes.

Q. And did you hear them say that he never got into fights?

A. I don't recall that. I remember a lot of—I don't remember everything. I do recall being told by at least one or maybe both of the teachers that he has problems with authority.

Q. And this is something they told you?

A. Yes.

Q. In a conversation you had with them?

A. Yes.

Q. Not something that they said this morning when they testified?

A. Well, it's something they told me when they were describing remembrance of Holly, what his main problem was.

Q. But this morning, did you hear them say anything about problems with authority?

A. No. No one asked.

Q. Did you hear them say anything about getting [209] into fights?

A. I don't recall it, no.

Q. Did you hear them say anything about getting suspended from school?

A. No.

Q. Do you have any reason to believe that he got into fights when he was in school?

A. I don't know that it was before fifteen. But in one document that I reviewed, there was a mention of a suspension for a fight.

Q. One suspension for a fight, and you don't know if that was before fifteen; is that right?

A. Right. But like I said, I'm not basing the diagnosis on that. Records are lost. And I recall one specific incident that is some evidence and then it's not a huge leap to make the diagnosis given the continuing behavior, the disregard for other people's rights.

MR. HOWLEY: I have no more questions for Dr. McClaren.

MR. JOHNSON: There's no redirect, Your Honor. At this point, Your Honor, the State would call Dr. Gregory Prichard.

GREG PRICHARD, PH.D.

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. [210] Could you please state your name for the record?

A. My name is Greg Prichard, P-R-I-C-H-A-R-D.

Q. Could you tell us your business address, Dr. Prichard?

A. I have a mailing address, P. 0. Box 237. And that is in Bristol, Florida, 32321.

Q. And what is your educational background?

A. I graduated from the University of Florida in 1988. I did my graduate work at the Forest Institute of Professional Psychology. That was in Huntsville, Alabama. That encompassed from about '89 through '93.

1993, I did my internship after my academics and went to Florida State Hospital. It's in Chattahoochee, Florida. It's an inpatient facility for individuals who are committed for incompetent to stand trial and not guilty by reason of insanity. It also has a civil admission track for just people who are crazy and need to be off the street that don't have any charges against them. I finished my internship in 1994.

After my internship, I was hired back at [211] Florida State Hospital on a dually diagnosed unit there. The dually diagnosed unit is individuals with mental retardation and mental illness. I served as the behavioral department head there for two years.

After that, I worked at a civil admission unit for individuals who typically because they had a mental illness and required some treatment in a psychiatry hospital and didn't want to get that treatment on their own.

About 1998, I began working at a forensic admission unit doing primarily competency evaluations and evaluating and treating individuals who had been committed as not guilty by reason of insanity to the hospital. In 1996, I was licensed by the State of Florida and started a part-time private practice. That was still when I was working at the diagnosis unit at the State of Florida Hospital for the mentally retarded and mentally ill.

I continued my part-time private practice in my area. Specialization was mental retardation. I performed hundreds of evaluations between '96 and '98 in the community and part-time private practice for the assessment of mental retardation. I maintained a part-time private practice until 2001. September of 2001, I went into full-time private practice. So I [212] did full-time private practice as a licensed clinical psychologist with specialization in forensic psychology and specialization in mental retardation and assessment in diagnostics and treatment of sex offenders.

Q. Would you tell the Court what professional licenses you hold?

A. I'm a licensed clinical psychologist in the state of Florida.

Q. Do you have any post-doctoral training?

A. When I finished my academic work, as I said, I went to Florida State Hospital and did my internship there. After I got my internship, since that time, really I've been working primarily with mentally retarded individuals, a lot of sexual offenders. I ran some community based sex offender groups for a couple of years. And primarily at this point in time I do evaluations for the courts, a number of capital cases with the issue for mental retardation assessments of competency to proceed, mental state at the time of offense, competency to waive Miranda, trial phase, sentencing phase.

Q. Do you have any certification issued by any state agencies?

A. I'm a certified forensic examiner in the [213] state of Florida.

Q. Over the course of your career,

Dr. Prichard, how many clinical evaluations have you conducted approximately?

A. I would say—I don't have any idea really. Probably several thousand in the issue of mental retardation. I've assessed well over five hundred people where the specific mandate by the court is assessment of mental retardation.

Q. Have you ever testified in court regarding forensic psychological issues?

A. Yes. A number of times.

Q. I'd like to really quick show you this document that I marked as State's Exhibit Number 2. Can you tell us what this document is, Dr. Prichard?

A. That is my curriculum vitae.

Q. Is that an accurate and correct representation of your curriculum vitae?

A. Yes. It's relatively recent. Probably printed out or revised within the last four to six months.

MR. JOHNSON: At this time, the State would move to introduce State's Exhibit Number 2 into evidence.

THE COURT: It's admitted.

MR. JOHNSON: [214] Your Honor, at this time, we would tender Dr. Prichard as an expert in the field of forensic psychology.

THE COURT: Proceed.

Q. Dr. Prichard, I would like to direct your attention to the person dressed in the prison outfit. Do you recognize this man?

A. Yes. That's Mr. Holly Wood.

Q. How do you know Holly Wood, Dr. Prichard?

A. Holly Wood is an individual that I have been assessing in conjunction with Dr. McClaren since—I think it was June 17 we initially saw him, so since or just prior to that time. He is the individual that I had been assessing. Dr. McClaren was asked by the attorney general's office to do an assessment for them

to determine whether or not he meets the criteria for mental retardation. Dr. McClaren asked me to work with him on this case because of my familiarity and expertise primarily with adaptive function measures in assessment of mental retardation.

Q. So you came onto this case with the expressed reason for evaluating what exactly?

A. For evaluating adaptive functioning. But providing Dr. McClaren with the information in terms of what direction to go when assessing adaptive [215] functioning who to talk to, et cetera, and what certain things mean on scales.

Q. How did you go about doing that?

A. Well, the first thing that was done is we went to Holman Prison. Dr. McClaren spent some time with Holly doing some testing. And I got a couple of correctional officers I was attempting to do adaptive behavior testing with regarding Holly's functioning in that environment. I talked with a gentleman—a corrections officer, Greg Pierce, when I was at Holman Prison. And I guess about half an hour into assessing Mr. Wood's adaptive behavior with Mr. Pierce, I determined that Mr. Pierce really did not have enough knowledge of Holly's functioning because Holly had been at Holman Prison for, I think, only a year or a little over a year. So I informed Dr. McClaren of this and determined that probably any of the corrections officer within Holman Prison would not be good respondents for adaptive measures.

Prior to leaving Holman prison that day, I did administer the Scales of Independent Behavior Revised Edition with Mr. Wood himself. Which one advantage of that measure, the SIBR, is it allows for administration of the instrument to the actual subject so that the subject can respond about their [216] capacities.

Q. Let's focus on that for one minute, Doctor. One more time for everybody in the court and record, what is the SIBR?

A. SIBR, Scales of Independent Behavior. It's the revised edition. It is one instrument that is utilized in our profession for the assessment—the accurate assessment of mental retardation. Actually there's three accepted instruments at this point in time. The three accepted instruments for measuring adaptive behavior are the one that Dr. Salekin used AAMR measures, the SIBR, and the Vineland Adaptive Behavior Scales. Those are the three that are generally accepted in the field of mental retardation as good instruments.

Q. So you evaluated Holly Wood by giving him this SIBR test?

A. Yes.

Q. What did you learn by giving him that test?

A. Well, originally at that point in time, which was June 17, what I learned is that Mr. Wood was assessing himself pretty high in terms of adaptive capacity. He was saying based on the—or his responses to the items on the SIBR essentially he was saying, well, yeah, I can do most of these adaptive [217] behaviors without much help. So at that point in time, that's what Mr. Wood was saying about himself. Obviously you can't just rely on something like that from a respondent, but that was a good starting point.

Q. Before we proceed on, did you use the AAMR in this case?

A. No, I did not.

Q. Why did you decide not to use that test?

A. Well, it's a good test with good statistical properties. It's been around for a while. I've been doing these kinds of assessments since about '94. And for me, it's not the ideal test for diagnosis of mental retardation. It's a great test when you know somebody

is mentally retarded and you're trying to devise some treatment planning for that individual. But in terms of diagnosis because the standardization sample is based on a population of mentally retarded people, it's—again, it's better for devising treatment plans for mentally retarded individuals. That's my opinion. And I would prefer to have what, for example, the Vineland gives me, which is adapted behavior of normal individuals in the population. And it can tell me if the person falls outside of what is generally normal given the person's age. And that's what I prefer for diagnosis.

Q. [218] Well, you stated that you gave Holly Wood this test. Did you also speak with Holly Wood asking him various questions?

A. Yes. At that point, it was limited questions. Again, Dr. McClaren had spent some time with him when I was not in the room. But I did speak to him in a limited kind of way. I didn't do a full clinical interview or anything, but limited kind of way at that point in time. I did speak to Holly.

Q. Did you learn anything about his hobbies, for example, or his work history?

A. Yes. Holly was reporting that his hobby is essentially cars. He took a great deal of pride in his cars. He liked good looking cars, and he bought a number of them, a minimum of three, sounds more like five or six over the course of his driving career. He really liked cars that he could kind of keep up and they looked good. He took a great deal of pride in his cars, so that was his hobby. That was his hobby. And, again, at that point in time, I didn't know if that was legitimate or not. I knew that was his self-report, but certainly I wanted to talk to a number of other people.

Q. Based on his self-report, did you discover that he reads anything such as magazines or books?

A. [219] Yeah, he reads. He doesn't read well. He told me he doesn't read well. And I think it's fairly clear that he doesn't read well. He's got some limitations in academic function; reading, writing, and arithmetic essentially. But he can read. He can read things that are fairly simple and letters—simple letters.

Q. Do you recall any magazines that he enjoys?

A. I cannot recall that he told me any specific magazine he enjoys.

Q. Did you interview Holly Wood's two teachers, Janet Penn and Hilda Maddox?

A. Yes.

MR. HOWLEY: I would object to this. They testified. The State had an opportunity to put them on here today. And I would object on the ground that if he is going to rely on something other than what was put in evidence today, it's improper.

THE COURT: Well, I'm not sure what your objection is. Your objection is that would be hearsay?

MR. HOWLEY: The question—he didn't ask him what his opinion was. He asked what he learned. It's hearsay. That's my objection.

THE COURT: And it's sustained.

Q. [220] Were you in the Court this morning when Barbara Siler testified?

A. Yes.

Q. Did you hear her testimony that Holly Wood sent his friend to the door when he wanted to speak with Ms. Siler?

A. Yes, I did hear that.

Q. What did testimony to that effect indicate to you?

A. I think it was likely some planning involved in that behavior. Probably—and this is speculation. But probably recognized that if he himself went to the

door there would be a particular outcome that wasn't what he desired, so he sent his friend to the door in the interest of having the outcome that he desired.

Q. Based on your evaluation of Mr. Wood, did you determine if he was, for example, able to pay bills in a timely basis, timely manner?

A. He didn't pay bills for Barbara Siler when he was dating her for the three years. I specifically asked her about that. He, Holly himself, reports that he was able to pay his own bills.

MR. HOWLEY: Objection. Hearsay, Your Honor.

THE COURT: [221] Overruled.

A. Everybody that I spoke to stated that Holly was extremely good with his money, he saved his money, he always had money, he always paid for the things he wanted and liked.

MR. HOWLEY: Same objection, Judge. We don't even know who is saying this. He's saying everybody I talked to said this. I object on hearsay.

THE COURT: Overruled.

A. So the individuals I talked to in conjunction with the evaluation were all saying those same things; that Holly was very good at managing his own money, nobody did it for him. So, I mean, that's one area of adaptive functioning earning the money and managing his own money, which, again, I paid attention to.

Q. Let's turn to a different topic. Did you review Dr. Salekin's report?

A. Yes.

Q. After reviewing her findings, do you find that you agree with her conclusions in this case?

A. No, I didn't agree with the conclusions.

Q. Why not?

A. Well, the biggest problem I had with the [222] evaluation—and keep in mind, when I read this report, I had not formulated an opinion about whether I thought Mr. Wood was mentally retarded or not. But when I read the report and I noted that it was just the one adaptive behavior scale administered by Dr. Salekin with the respondent Johnnie Pearl. That was my biggest area of concern. And there's a number of reasons for that.

First is that it has been my experience in these cases and in cases since 1996 or so that sometimes family members can be biased. You can get biased information from family members. It's a well known reality in the area of forensic psychology that you have to pay attention to that.

A second reason is that the definition of mental retardation, although certainly there is the prong manifestation prior to the age of eighteen, the diagnosis of mental retardation in the diagnostic and statistical manual text revision says there has to be deficits or concurrent present deficits in adaptive behavior. So although you have to look historically pre-eighteen to satisfy the definition of mental retardation, you also have to look at present adaptive behavior.

And there's a very obvious reason for that. [223] And the reason for that has already been stated. don't know who said it, but I'll repeat. It is that adaptive behavior abilities can change over time. Because somebody has a deficit or some deficits in adaptive behavior consistent with mental retardation at the age of thirteen, fourteen, or fifteen, does not mean that at the age of more than forty, the person continues to have the deficits in adaptive behavior.

In fact, individuals with intellectual quotients in the mild mentally retarded range can learn skills

relatively easy. And they typically learn those skills when they mature a little bit because they are developmentally delayed, so they have to get a little older before they reach their capacity.

Q. Doctor, let's turn to the Vineland reports that you administered to various individuals. How many Vineland reports did you administer in this case?

A. I administered the classroom edition Vineland to two teachers, Janet Penn and Hilda Maddox. I also administered a Vineland survey edition to Ms. Johnnie Pearl Wood. I did a Vineland to Ms. Maeola Wood and a Vineland to Ms. Barbara Siler.

Q. What was the result of the Vineland done to Johnnie Pearl Wood?

A. [224] The result of the adaptive behavior test—we call it the WRAT—for that particular administration was a 41.

Q. What would a 41 score mean practically speaking?

A. Practically speaking, a 41 would mean that Mr. Wood would require pretty much constant to frequent supervision. It means that he would have to have a caretaker with him almost all the time, present at least in the same room or very close by, because he's going to have significant deficits in his abilities to care for himself. And I'm talking about simple things like brushing his teeth and putting on his clothes and eating his meals.

And adaptive behavior score of 41 is consistent with mental retardation where the deficits are more significant. And an adaptive behavior score of 41 is also consistent with an age equivalent score of about five to six years old. So what you're saying essentially is that the adaptive behavior skills that Mr. Wood possess, as reported by Johnnie Pearl Wood, would

mean that he's functioning about the age of a five to six year old child.

Q. Do you think it's reasonably possible that he's functioning at the level of a five year old?

A. [225] Well, when I talked to Johnnie Pearl, I didn't think it was impossible because I've seen that happen before. But as I progressed into my assessment, it became extremely apparent that that was not consistent with his functioning in the community. That's the issue. The issue is not, you know, can a mentally retarded person drive a truck. That's not the issue.

The issue is when you have data that you rely upon, for example, the 41 from Johnnie Pearl and, for example, in my opinion the information Dr. Salekin got from Johnnie Pearl, when you rely on that information, it is incumbent upon the professional to assess whether or not the information you're getting is reliable information. Because if it's not reliable information, you're going to draw erroneous conclusions based on that information.

And so the issue became what Johnnie Pearl told me and told other people who talked to her, is it consistent with the other stuff we know about Holly Wood? And as the evaluation unfolded, it was obvious that it wasn't.

Q. What about with respect to Maeola Wood? You administered the Vineland to her; is that correct?

A. Yes, I did. I assessed—I used Maeola as [226] a respondent on one of my Vinelands. She gave me an adaptive behavior score of 55, which was still pretty darn low. Remember the mean is 100, standard deviation is 15, 70 or below is considered mentally retarded. And 55 is right there at the mild to moderately mentally retarded range.

So that's—you're still talking about real significant adaptive deficits, somebody who would require a lot of supervision to just do the normal things, normal simple things. Were not talking about—I'm not talking about now I'm driving mechanized things in the work field or earning your own money or owning cars. I'm talking about he would need supervision with close to moderate level of adaptive deficits in almost every area of his life.

Q. Would the other evidence in this case that you have seen and examined support such a finding?

A. No. That was the issue. As it unfolded, no, there was a great deal of data that suggested that that was not true.

Q. How about Barbara Siler? Did you perform a Vineland with her?

A. I gave her also the Vineland, the survey edition.

Q. What were the results of that Vineland test?

A. [227] Barbara's adaptive behavior composite score was 68, which that seemed reasonable. Barbara —you know, one of the things that I have learned in cases that I've dealt with regarding mental retardation is, again, a lot of times, you can run into some bias with family members. And it may not even be intentional distortions, but certainly biased because they want to help their loved one. But with Barbara, she seemed real objective. And her adaptive behavior score was 68.

Q. Is there a reason why that 68 score might be lowered in her case?

A. Well, I thought it was good data, and I thought it was more within the ball park of his adaptive behavior abilities. But in terms of daily living skills, she gave me scores that indicated that was one of his big strengths. He was very good at taking care of his clothes, his hair and his nails, his car, all that stuff.

According to her responses, he had some deficits in the area of communication and socialization. And we talked a little bit about that. And it sounded like to me that Holly and Ms. Siler started out pretty well in their relationship. But as it progressed, it got worse and worse. And the [228] way she described it is he was not very kind to her. And she felt like he was she was used quite a bit by Holly.

So it's possible that some of the communication and socialization deficiencies as reported by Ms. Siler were actually that Holly wasn't interested in, you know, carrying on a conversation with Barbara but more interested in going to a motel or getting something to eat, but not really getting into any in-depth conversations and doing things with her on a regular basis other than going to the motel.

Q. What about the officials of the Department of Corrections? You performed a Vineland test on them as well; is that true?

A. Yeah, I did. We did a number of Vinelands in the context of the prisons. And, again, we saw—let's see —Mr. Cargill, Jerry Witherspoon. Dr. McClaren saw Willie Ryans. I attempted with Mr. Pierce, like I mentioned at the original prison we went to. And I also attempted with a fellow named M. Burton, who was a correctional officer. He worked third shift and determined that he didn't have enough knowledge of Holly. But we were able to get three reports from correctional officers.

Q. Let's look at Mr. Cargill and Mr. [229] Witherspoon. First, Mr. Cargill, what was the result of the Vineland test that you administered to this individual?

A. The Vineland test was a 103. And I must say at this point that it's important to recognize on the administration of the scale of independent behavior or any other adaptive behavior in the context of death

row in the context of prison, you have to mention the limitations of that. It would be unethical for me not to. There's certainly limitations in that environment. Because just the breadth of behavior is not there in the context of death row to actually engage in a lot of the things that defense counsel have already brought out. You're just not able to do it.

But the larger, I think, issue is that if you're going to diagnose mental retardation, you darn well better try to get present adaptive functioning scores or you're really missing the boat. So you have to attempt it, but you have to express the limitations of that approach.

Q. What about with Mr. Witherspoon? What was the result of that Vineland?

A. Mr. Witherspoon provided 117.

Q. So, Doctor, what was the general range in [230] these Vineland scores just to summarize for the Court?

A. Well, that's the important thing to know. It has to be recognized—I mean, the range of the adaptive scales administered during the course of my evaluation of Mr. Wood is phenomenal, and obviously something is wrong, and some data is not accurate. It ranges from a 41 to a 117, and that just doesn't happen.

So what you do is you try to get as many data points as is possible in terms of people who had some experience with Mr. Wood, observing Mr. Wood, and interacting with Mr. Wood. I mean, you get all the information that you can and then you make the judgment. Basically, that's what I did.

Q. Would it be important to you, Dr. Prichard, that someone who is more familiar with Mr. Wood recently, as opposed to say the past two or three years that scored an 80, 90, or 110, as opposed to someone who knew him thirty years ago who gave him scores of 56? Does proximity of time matter?

A. Certainly to—for this reason—and I think I probably already said it, proximity in time, because as a forty-three year old man now, he has matured and is likely functioning in terms of adaptive skills at his capacity at this point in time. The [231] information from thirty years ago when he was fifteen years old, he was—you know, he was an adolescent and he was an adolescent with a real harsh environment in terms of his mom dying and a lot of other things. And I don't think that you can take the information from that point in time and extrapolate from there to now and say that it still exists. I think you have to dig a little deeper.

Q. When you were examining Mr. Wood at the Holman Prison, was he able to hold a conversation with you?

A. Yeah, he was. He was—he doesn't articulate perfectly, but he certainly communicated his point.

Q. Did he pay attention to your questions and eagerly participate in the process?

A. Yes. He seemed to comprehend the instructions from the SIBR. He had a good sense of humor. He made a couple of jokes. I made a couple of jokes. I talked to him again last night with Dr. McClaren because we always like to do that, see the individual one time through the assessment and see the individual a second time and wrap up loose ends.

And last night we had an hour long discussion. And I learned a great deal about him. He [232] told me a lot about what he used to do, about his hobbies, about Ms. Siler, about crimes he had committed, about his family, about cooking, about cleaning, his traveling. So it was a good conversation, and he expressed himself well.

Q. Based on your own professional experience, is it typical for mentally retarded individuals, people up

to mild mental retardation, to be able to drive a forklift or a front-end loader in the course of a job on a daily basis?

A. That's obviously been a sticky issue here, and this is my answer and my opinion. A mentally retarded person can drive. A mentally retarded person probably can be taught to drive a forklift. I've evaluated probably more than four hundred individuals who are ultimately mentally retarded, and I never met one that drove a forklift. So let's say that it is possible, I suppose, but certainly not probable and certainly not common.

The other issue is, again, you know, I have to assess the information I read in Dr. Salekin's I report. Is it consistent? Is it reliable? Can I base part of my judgment on that? And the information that came from Johnnie Pearl. And I think not. I think when you talk about adaptive deficits in the [233] moderately mentally retarded range constant support and supervision, that is not consistent.

It's absolutely not consistent with operating a front-end loader, with driving your own car and maintaining your own cars, with taking trips to Florida, with catching a bus going to Florida, with managing your own money, with taking absolutely wonderful care of his clothes according to everybody, his hair, his fingernails, maintaining a relationship with a woman for three and a half years where he had to travel from Luverne to Troy, purchasing motel rooms, to do that, earning a living and doing pretty darn well, I would say that all of those things you have to pay attention to. And is that kind of history consistent with mental retardation? Certainly not in my experience.

Q. So based on your evaluation of Mr. Holly Wood, what is your bottom line conclusion or finding in this case?

A. My bottom line finding is that his adaptive skills are not impaired in the mentally retarded range. They are sufficient—and this is the important definitional thing: They are sufficient for independent functioning. He functioned independently by and large from the age of sixteen or seventeen on; [234] personal and social sufficiency, independent functioning in virtually every area of his life, nobody holding his hand to do things.

Given his cognitive limitations, which he has, he has adapted remarkably well. Now, I would say his adaptive skills are probably on the borderline to—high borderline range, potentially in some areas even average.

Q. If you were looking at that Vineland test score, for example, the 41 and 117, based on your evaluation of Mr. Wood, where would you find that he falls?

A. Well, I'll—again, it's just based on all the data, not just like taking these two and averaging them or anything really arbitrary like that. It's just based on all the information I got in conversations with him, conversations with people who know him now, in the limited context of death row, conversations with his ex-girlfriend, his teachers. I think that he has been demonstrating his capacity to adapt independently and meet the demands of daily living. And I don't see anybody or anything that points to the contrary of that aside from he's got some real problems with his academic skills.

He didn't like school. He may not have [235] liked school because he couldn't get it, and he just showed no interest. But it could have been he was just not motivated. And there's lot of reasons for poor function in school.

Q. One last question, Dr. Prichard. Do you disagree with any of findings and conclusions of Dr. McClaren in this case?

A. No. I haven't heard anything Dr. McClaren stated that I would disagree with. But keep in mind, my primary responsibility in this case was to assess adaptive functioning.

For example, the question, is Mr. Wood antisocial. I didn't really address that. I gave it some fleeting thought, but I didn't address that.

MR. JOHNSON: Thank you. I pass the witness.

CROSS EXAMINATION

BY MR. HOWLEY:

Q. Dr. Prichard, do you have any disagreement with Dr. McClaren in terms of what he testified to about Mr. Wood's IQ scores?

A. No, I don't. I think that what the information has shown is that consistently over time he's functioned right about the same intellectually.

Q. Let me spend my time on adaptive [236] functioning. I'll try not to jump around too much. But if I do and it's confusing, let me know.

When you're administering the Scales of Independent Behavior Revised, does it matter what type of environment the person has observed Mr. Wood?

A. Well, no, not when you're administering it. I would say the administration is not the most important issue for the SIBR. I would say what you do with that information. You have to recognize the limitations. That's the important point.

You have to know that some of the information you're getting from the respondents they are clearly estimating. They didn't have any opportunity to observe the behavior actually being performed. But the

manual allows for that. That's why I think it's the best one for institutional settings because it allows for estimation.

But you can't take that information in that context and say because of this I conclude this definitively. I think you have to express the limitations and recognize those limitations.

Q. When you're assessing the results, do you have to consider whether the environment was highly structured or unstructured?

A. Yeah, I think that you should in all [237] instances determine or assess the environment.

Q. You said something about—and I'm not going to quote you, so tell me if I got the thought wrong. But about people's adaptive functioning changing over time. Is that roughly correct?

A. Yes.

Q. And so someone who knew Mr. Wood before he turned eighteen could have a different view of his adaptive functioning than someone who knew him when he was thirty-five to forty?

A. Yes.

Q. And both could be completely accurate because he could have changed over time?

A. Yeah. I would say that that's true. Both of them could have been accurate.

Q. You mentioned that the death row prison environment has certain limitations. Could you tell us what those limitations are?

A. Well, I think the limitations are pretty obvious. They're in their cell a lot of the time. I think it's—I think it's twenty-three hours a day, maybe twenty-two hours a day, something like that. They have opportunities to come out and participate in some athletic events, ping pong, watch TV, play cards. They

also have some groups that they're able [238] to participate in.

But by and large, the bulk of the day, they're in their cell. And so there's a real restriction in the repertoire of behavior the person has an opportunity to engage in. So essentially that's the biggest limitation. It's a very structured environment.

Q. You said something about your impression that Mr. Wood was able to earn a living. Do you know whether he paid for his own housing?

A. Well, that's not really earning a living. Earning a living is more in reference to his work, being able to go out there and get a job. Nobody, you know, held his hand and said let's go down here and see if we can get a job.

And incidently that's done a lot with developmental disabilities people, people who are mentally retarded and getting services from developmental disabilities. Their support coordinator or somebody else in their care will take them to try to get a job.

Holly did it on his own, so I was really referring to his capacity to earn a living as get a job, make money, hang onto his money, always have it, not blow it, buy clothes with it, buy gas with it, buy [239] transportation with it, stuff like that.

Q. Well, that's a fair distinction. Let me talk to you about how he spent his money. Do you know if he paid for his own housing?

A. I don't know if he paid for his own housing when he was living with Johnnie Pearl, which was kind of in and out as I understand it. So I'm not sure. I do know that at least on the weekends between '80 and '84 when he was—well, '81 and '84, when he was dating Barbara Siler, he was paying for motels each weekend. But my assumption is that he was not, like, paying rent at Johnnie Pearl's house.

Q. When you say he paid for motels, did someone tell you that it was his money that was used to pay for the motel?

A. Barbara—Barbara Siler.

Q. And that was in an interview that you had with her?

A. Yeah. She said he always had money—he always had money in his pocket, and he was a good worker. He usually paid for everything except didn't pay her bills, so I assume that meant food and stuff when he came to see her and motels and gas, things of that nature.

Q. Other than paying for motels, food, gas when [240] he was dating her, do you have any knowledge of what he spent his money on?

A. I would have to assume he spent his money on, you know, cars and maintenance of cars and clothes. And, you know, the important thing I'm trying to express is that, you know, when you're considering mental retardation, was he borrowing from everybody, did somebody else have to take care of him and pay for things. I mean, that's essentially what you're getting at. Or did he earn money independently and use that money.

I mean, I may not have asked specifically, well, what did Holly spend his money on. But I did ask did he have money. And everybody's response—really everybody's response, his family and his girlfriend and Holly himself, he always had money in his pocket from his work.

Q. But in terms of what he spent it on, you're making assumptions?

A. Yes. I didn't ask specifically.

Q. If it turned out that, in fact, his father was giving him money and he was blowing his money,

would that change in any way your assessment of his adaptive functioning?

A. I don't know. I mean, it would certainly be [241] good to know. And it's not the first time I've heard that. I talked to a fellow last night, Clay Dixon, who was an old family friend. And Clay said that Dad used to give him money and Dad liked Holly. Essentially, I guess, Dad took a real liking to Holly and made some of his siblings kind of jealous. But, yeah, Dad helped him on occasion. In fact, helped him on one occasion go get a car when he financed it through the bank. So did my mom, you know, my first car.

Q. But you're sitting here testifying that one of the factors that you considered in reaching your conclusions was that he earned his own money and was able to manage it; is that correct?

A. Yes, that is correct.

Q. And if it turned out, in fact, that he wasn't able to manage his money, but the reason he had a lot of money is because his father kept giving it to him, would that tend to change at least that factor in your consideration?

A. I'd have to have good evidence of that, but it would certainly give me something to think about. That's not what I heard. Now, keep in mind, I heard that Dad did give him some money sometimes, but sometimes Holly was working—we know that—and [242] earning his own money. So, you know, I'd have to take a look at that.

Q. Do you know how much he earned when he was working at Pepsi?

A. I saw it, but I can't remember now. It wasn't a whole lot of money, but that was a long time ago.

Q. Do you know what he earned at the lead plant?

A. Again, I've read it, but I can't remember it. It was probably minimum wage.

Q. So in terms of the amount of money he had and what he did with it, your knowledge is based on speaking to Barbara Siler, this gentleman you spoke to last night, and other people?

A. Yeah, his family, too. I mean, that was one thing that they said, too, was that he always had money.

Q. So the totality of your knowledge on this issue of how much money he had and what he did with it came from your conversations with other people; is that correct?

A. Yeah.

Q. Do you know if he actually prepared his own meals while he was living with Johnnie Pearl?

A. [243] Johnnie Pearl says no. But, you know, Holly didn't say no. He said that—he said, in fact, that he prepared some meals; but when he got older, he prepared a whole lot of meals. When he was living with Johnnie Pearl as a younger man in his adolescence, perhaps early twenties, he said that he was more responsible for taking care of, like, the lawn, doing some sweeping; that the women typically cooked. He would change light bulbs. If the toilet got clogged, he would get the thing with the snake that you'd do down the toilet and he would fix it.

So according to what Holly was telling me, it sounded more like traditional masculine domestic tasks than doing, you know, what are more typically feminine tasks in the household.

Q. I realize that there's all sorts of data on how many lawyers it takes to change a light bulb. Is it conceivable that a person who is mentally retarded could change a light bulb?

A. Yeah, it is conceivable. But I don't want anybody to be misled. I'm not making any judgment based exclusively on the ability to change a light bulb.

You know, I'm talking about adaptive skills, the ability to independently function doing the things [244] that the rest us are required to do in making it in the world. When a light bulb burns out in your house, if nobody changed it because you're mentally retarded, then you'd live in the dark basically. And he's able to do those. It's just adaptive skills.

MR. HOWLEY: Your Honor, I'd ask to strike that after yes. I asked very simply a yes or no question. We will be here all night if he's going to answer my yes or no questions with self-serving speeches.

MR. HAYDEN: He didn't interrupt the doctor, Your Honor. If he was unresponsive, he should have stopped him after yes.

THE COURT: I would have concluded as much as what he said without him having said it anyway. Granted. Struck.

Q. Is it conceivable that a person with mental retardation can use a snake to clean the toilet?

A. I think it's conceivable, yes, but not common.

Q. Is it conceivable that a person with mental retardation can mow the lawn?

A. I would, again, say conceivable, maybe more common than using a snake for the toilet, but not again common.

Q. [245] Let me take you to your initial visit at Holman. And you said you spoke to a correctional officer, Pierce; is that correct?

A. Yes, sir.

Q. Did you complete any assessment or evaluation based on that information?

A. No. Again, I talked him. And it just became apparent—and this happens fairly regularly in mental retardation cases that you discover that the

respondent, the person you're talking to, just doesn't have enough knowledge.

Q. All I'm after is do you have any SIBR or Vinelands for any of the correction officers at Holman?

A. I didn't complete one. I do have—let me see here. I do have Mr. Pierce's that I did not obviously complete, as I'm saying. I got into the second section. The first section is gross motor. The second section is fine motor. And it's in the fine motor that I determined there's no point in this. He didn't have enough knowledge of Mr. Wood.

Q. Now, let me ask you about the instrument Dr. Salekin used to assess adaptive functioning. And you said one of the reasons you didn't use that is because it's normed to people with mental [246] retardation. Do I have that right?

A. Yes.

Q. Would you expect that if you gave or administered such an instrument to a person who is not mentally retarded that they would score higher than the norm for mental retardation?

A. Yes. Again, I'm not criticizing. It's a great instrument. It's just one that I don't use for diagnosis.

Q. Do you know if Mr. Wood ever had any bank accounts?

A. Nobody ever said that he did. I'm assuming that no, he never had a bank account.

MR. HOWLEY: I have no more questions.

MR. HAYDEN: Your Honor, just a few brief questions on redirect.

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Dr. Prichard, did you encounter any evidence through your investigation to show or indicate that he was, in fact, supported by his father?

A. No.

Q. Did you encounter any evidence during your investigation and evaluation of Holly Wood to indicate that he was given money to sustain him by his father?

A. [247] I'm trying to remember who said—one person said that Dad gave him money sometimes. I know who it was. It was Clay Dixon last night: Dad sometimes gave him money and it upset other family members. But that's the only thing I heard about that issue.

Q. With respect to the issue of cooking, Dr. Prichard, is it conceivable that Holly Wood didn't cook assuming, in fact, that he didn't cook at home because others were present and wanted to do it instead?

A. Absolutely. And I would say that at fifteen and sixteen I didn't cook either.

Q. Is it therefore conceivable that Holly Wood didn't cook because he was simply lazy as opposed to because he couldn't cook?

A. Lazy or young age or it was the duty of his sister, a lot of different reasons.

Q. Finally, you were asked the question on cross-examination about whether mentally retarded individuals can change a light bulb. And you were attempting to explain that it's not part—that it's not something simply like cranking a car or changing a light, but the process of looking at adaptive functioning, so to speak. Could you finish explaining [248] that for the record?

A. Yeah. It's not one specific—each one specific skill, light bulb changing, that determines mental retardation or the presence of or the absence of. It's all the information in total. And why I said that is that's one tiny area, changing a light bulb, does he take care of responsibilities in his environment? And

that's adaptive behavior. Does he do it independently? That's adaptive behavior. So that's what my assessment ultimately that I concluded that his adaptive behavior skills, his independent functioning, his personal and social sufficiency was not impaired consistent with mental retardation.

MR. JOHNSON: No more questions.

MR. HOWLEY: No further questions.

MR. JOHNSON: The State has no more witnesses to call, Your Honor.

MR. HOWLEY: We have nothing further, Your Honor, but we would like to have the opportunity to submit proposed findings of fact and conclusions of law.

THE COURT: And unfortunately, I'm going to have to restrict counsel in that regard. I mean, we're talking about September. I have roughly a month in which to submit something to the Court of Criminal

Karen L. Salekin, Ph. D.
Clinical and Forensic Psychology

2821 7th Street
Tuscaloosa, AL 35401

REDACTED
EMAIL REDACTED

PSYCHOLOGICAL ASSESSMENT

Person Assessed:	Relationship:	Age:
Holly B. Wood	Respondent	43
Gender:	**DOB:**	**Assessment Date:**
Male	[Redacted]	07-15-03 (7.0 hr)
		Date of Report: 07-22-03

Evaluation Procedures

Interview with and Assessment of Mr. Holly B. Wood

Consultations

- Telephone consultation with Mr. Brady Mills, Attorney
- Telephone consultation with Ms. Jessica Hodkinson, Attorney
- Telephone consultation with Stephen Moyer, University Psychological Associates, N.C.
- Telephone consultation with Ms. Hilda Maddux, Special Education teacher for Mr. Wood
- Telephone consultation with Ms. Janet Penn, Special Education teacher for Mr. Wood
- Telephone consultation with Mr. Charles Sport, Principal of Mr Wood's school
- In person interview with Ms. Johnnie Pearl Wood, sister of Mr. Wood (07-14-03)
- In person interview with Ms. Johnnie Pearl Wood, sister of Mr. Wood (07-14-03)

Review of Records

Numerous court records provided to the examiner by the defense team
Affidavit of Dr. Faye E. Sultan, Ph.D.
Medical Records from the Department of Corrections
Psychological Interview/Data Entry Form (03-29-85; 11-13-91; 02-24-95)
Forensic Psychological Evaluation completed by Michael T. D'Errico, Ph.D. (06-30-92)
Outpatient Forensic Evaluation Report completed by Karl Kirkland, Ph.D. (05-11-94)
Employment Questionnaire (front page) and Personnel Envelo-File from the Pepsi Cola Bottling Co. (06-30-76)

Psychological Tests and Procedures

Mr. Wood:
Stanford Binet Intelligence Scales—Fifth Edition (SB-5)
Test of Malingered Memory (TOMM)
Wide Range Achievement Test (WRAT3)
Instruments for Assessing Understanding & Appreciation of Miranda Rights

Ms. Johnnie Pearl Wood:
AAMR Adaptive Behavior Scales—Residential and Community Version, 2 (ABS-RC:2)

Submitted To

John J. P. Hawley and Brady Mills
Faye Scholer LLP

Prepared By
Karen Salekin, Ph.D.,
Clinical and Forensic Psychologist

The information contained in this Evaluation Report is confidential. It is intended only for use alike presiding judge, authorized court personnel, Department of Children and Families, correctional probation officers, law enforcement agents and other entities specified by law, except upon Court Order.

REASON FOR REFERRAL

Mr. Holly Wood was evaluated at Holman Prison in Atmore, Alabama for the purpose of evaluating his intellectual and functional capacity. At the time of evaluation, the respondent had been detained for approximately 10 years following his arrest and eventual conviction on the charge of Capital Murder. This evaluation was conducted as part of a Rule 32 Petition that has been filed on behalf of Mr. Wood.

NOTIFICATION

Prior to conducting the evaluation, all individuals contacted for the purposes of completing this evaluation were informed of the nature and purpose of the evaluation and the limits of confidentiality of the information obtained. All parties were informed that the evaluation was being conducted at the request of Mr. Wood's defense team and that the results of the evaluation would be provided to the defense team in the form of a written report or verbal testimony at their request. They were informed that, should the examiner be asked to write a report or testify at a hearing, the information provided by them could become part of a formal record. All parties were provided the opportunity to decline to be interviewed or assessed before any questions were asked. Parties that agreed to participate include Maeola Wood, Johnnie Pearl Wood, Stephen Moyer, Janet Penn, Hilda Maddux, Charles Sport, and Holly Wood. Contacts were made with Dr. Holbrook (Psychiatrist at Holman Prison) and Mr. Powers (Classification Officer at Holman Prison), both of whom declined to participate in the interview. In the opinion of this examiner, all individuals who participated in the current evaluation understood the information provided in the notification and agreed to proceed.

SUMMARY OF FINDINGS

IDENTIFYING INFORMATION

Mr. Wood is a 43-year-old, single, African-American man who currently resides at Holman, Prison, a maximum security prison that houses death row inmates in the state of Alabama. Mr. Wood stated that he was born in Troy Alabama, had never been married, and is known to be the father of two children. With regard to immediate family, Mr. Wood is the third eldest in a sib-ship of seven. At the time of writing, Mr. Wood has five members of his immediate family still living. Deceased are Ms. Betty Simmons (mother of the respondent), Mr. J.P. Wood (father of the respondent; never resided with the family), and Mr. Samuel Wood (younger brother of the respondent). Mr. Wood's mother died as a result of a respiratory illness when she was approximately thirty-two years of age, his father died of a heart attack in 1995, and his brother died in a car accident at the age of 11 years. According to available information, the death of his brother was particularly traumatic for the respondent and represented a life event that resulted in severe behavioral disturbance and the development of a negative attitude toward life.

When asked about upbringing, Mr. Wood and his sisters stated that they were raised in a small home in the country with few amenities. The family worked as sharecroppers, raised and slaughtered pigs and cows, and obtained water from a local spring. Financial support for the family came in the form of government assistance with some support from the children's father, as well as money earned from the sale of moonshine. There appeared to be no safety concerns related to the sale of moonshine from the

home but it was noted that it would not be uncommon to have "a lot of drunks" loitering in front of the home. All of the Wood children attended school and all of them attended to chores and worked the farm daily. As young children they picked vegetables and fruit, plowed the field, and took care of livestock. When asked about nutrition and the provision of necessities, all family members interviewed stated that they had everything that they needed and were provided with substantial amounts of food due to their involvement in sharecropping. When asked to describe their mother, it became apparent that the Wood children had somewhat different views of her. While all of them considered her to be a strict disciplinarian, one sister described her to be "a sweet woman" who did not beat her children and taught them that if they treated other people kindly, they would be treated kindly in return. This statement is in direct contrast to that of Mr. Wood who reported that his mother was extremely tough and a person who would not back down from anyone. In fact, he reported that his mother had seriously threatened the lives of two people, carried a pocket knife for protection and kept a gun in the home. Her typical form of discipline was "a whooping" and she was known to use her shotgun to scare the children into behaving appropriately, completing their chores, or to summon them home if they were not nearby (i.e., shot in the ground to scare them and shot in the air to call them home). Despite the discrepancies, the three siblings interviewed all agreed that their mother was not overly harsh in terms of discipline.

Following the death of Ms. Simmons, her seven children were placed in the care of their aunt, Sarah Harris. This living arrangement was reported to have been short-lived (approximately one to two years) and

relatively trouble free. In fact, the children experienced little disruption in their daily lives. For example, they continued to work the farm, completed daily chores, and attended school. Of import, however, was that the family of seven children moved into a home that was already overcrowded resulting in approximately fourteen people residing in a three-bedroom home.

After Ms. Harris stopped being the primary caretaker, the job of raising the Wood children was passed on to their half-sister, Nealzena Wood. Mr. Wood's father assisted the family by providing food, clothing, and other necessities required by the children but it was Nealzena who was the primary disciplinarian. All sources of information indicate that the home environment provided by Nealzena was harsh, strict, and lacking in affection. She was reported to have beat the children severely for any violation of the house rules and she did so on a regular basis. The most typical instrument used in these beatings was an extension cord, which she used on the naked bodies of the Wood children. These beatings were described as severe, leaving lash marks, open cuts, and bruising all over their bodies. According to all sources, Mr. Wood received the majority of the beatings by Nealzena. Not only did she beat him frequently but often times she would beat him until she reached the point of exhaustion. On one occasion, Nealzena became particularly infuriated with Mr. Wood (apparently she had to chase him so that she could beat him) that she tied him to a cedar tree and beat him repeatedly with an extension cord. According to Mr. Wood, these beatings were the reason he left the family home and chose to reside with his maternal grandmother. It is his recollection that he moved out of the home at the age of 14 years. Not

long after his departure, Nealzena reportedly left the family and his older sister, Johnnie Pearl, took over the responsibility of child rearing.

Mr. Wood indicated that he lived with his grandmother for approximately two years and, after that, was in and out of Johnnie Pearl's home. According to his report, at this point in time it was he, Johnnie Pearl, and his father who provided money and household goods to support the family. This statement was contradicted by his sisters who reported that their brother did not support the family, that he would take whatever he could get from them (e.g., money, food), and often refused to provide them with the car to drive to town to purchase groceries. They described him as a self-centered individual who was focused on material goods and appearing cool to his friends. He was reported to have been extremely well groomed, focused on his appearance, and his largest source of pride was reported to have been his cars. Despite his outward appearance of independence and popularity, Mr. Wood did not possess the rudimentary abilities required to take care of himself. He never learned to cook or clean and was always dependant on others to provide for him. Though the respondent was often employed, it was his father that was his primary source of financial support and provided him with almost anything that he wanted.[1]

When asked about conflict within the immediate family, Mr. Wood stated that he and his sisters argued and fought about insignificant matters but added that they generally got along well. In contrast, however, his sisters stated that their brother was

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[1] It is important to note that some of these statements are contradictory to those provided in the penalty phase of the trial and during the Rule 32 hearing.

always in conflict with someone in the home. He was known for engaging in bothersome behavior with his sisters (e.g., "cuffing them on the head," "poking them with pins"), being disobedient and disrespectful to authority figures, and for threatening to, or engaging in, physical violence. The home was described as somewhat chaotic with a lot of arguing and general discord. When asked about physical or verbal abuse among the siblings, it was reported that Mr. Wood would cuss out his sisters, call them abusive names, and had threatened them in order to get his way. As an example, one sister reported that he would say things like, "Bitch. Open up the door" and would pound on it repeatedly until she would let him in.

Mr. Wood indicated that over the course of his lifetime he had witnessed numerous instances of violence against others. Within the home, it was not uncommon to see his mother and father engaged in a physical fight. Moreover, he has personally seen multiple people having been shot or stabbed. When asked about his involvement with violent behavior, Mr. Wood indicated that he did not think of himself as a violent person but admitted to being in some altercations that resulted in injury to others. For example, he described an instance in which he repeatedly stabbed at the hands of a female friend with a pocket knife, a time when he accidentally broke his girlfriend's arm during a fight, and stated that he had purposely stabbed his friend in the chest during an altercation. Though denied by Mr. Wood, one sister stated that her brother had threatened to weld together one of his teachers, had threatened to kill the Principal of his school, and would tear up the property of others if he were angry with them. Both of his sisters stated that their brother had an extremely bad temper and was easily set off.

Mr. Wood has a ninth (perhaps tenth) grade education obtained within a track known as "vocational rehabilitation." Information provided from multiple sources suggests that, despite attending school for nine years, he likely does not have the knowledge or skills representative of such an education. When discussing his experience in school, the respondent indicated clearly that he did not like school, that he purposely acted up in the classroom, and that he refused to comply with his teacher's requests. Mr. Wood added that, in his opinion, the teachers did not provide an education to the children in the vocational rehabilitation track, rather they let some of them graduate without having basic abilities such as reading or computing simple mathematical operations. Collateral information indicates that Mr. Wood was a slow learner and earned grades that were in the low to average range as compared to other special education students. Though school records were not available, information provided by his high school special education teacher, Ms. Maddux, indicates that Mr. Wood was formally assessed and determined to be EMR (educable mentally retarded). It was her recollection that his IQ fell in the mid 60's to low 70's range. Mr. Wood's difficulties with conforming to the rules of the school and his tendency to be defiant and disrespectful to authority figures were also supported by statements made by his sisters and Ms. Maddux.

When asked about teasing within the school environment, Mr. Wood denied being teased excessively but did remember being called a "mole", a name given to children in the vocational rehabilitation tract. This name was reported to have originated within the special education track and was related to the fact that the location of the program was in the basement

of the building. The location of the building was referred to as the "mole hole" and the people in it as "moles." Mr. Wood did not recall any other direct teasing though he remarked that some people would call him stinky and did so because his clothes would sometimes smell of urine. His explanation for this was that his cousin, with whom he slept, often urinated in the bed and their proximal association caused the odor. His sisters who stated that Mr. Wood suffered with nocturnal enuresis until his late childhood or early teen years did not support this explanation. Not only did he have the disorder, but he was also beaten each time it occurred. In addition to being referred to as a "mole" and being teased for self-care, it was reported that the respondent was also teased about his limited intellectual capabilities. Statements made by Douglas Brown (a teacher of Mr. Wood's) indicate that children would try to tease or humiliate other children by referring to them as "Holly B" a term that was used to suggest that the person had limited intellectual functioning. In addition to being teased, one of his sisters reported that Mr. Wood used to pick on some of the children within the vocational rehabilitation track and that he was known as a bully within this environment. This statement was not supported by either Ms. Maddux or Ms. Penn.

Mr. Wood's first formal job occurred at the age of 13 years when he earned money for catching chickens. He has since worked for Coca Cola and Pepsi, and has been a laborer at pulp mill, one or more construction companies, and was self-employed doing odd jobs. His specific job requirements included, but are not limited to loading, logging, cement finishing, and "building homes." Mr. Wood denied having received formal training for any of his jobs and indi-

cated that he learned to do the work by watching others do it first and then trying it himself. Available records suggest that the respondent was neither reliable nor effective in his positions.

As per the psychological report provided by Dr. Kirldand, Mr. Wood's criminal history includes 13 charges between the years of 1981 and 1992. These charges include but are not limited to Disorderly Conduct, Attempting to Elude, Theft of Property, Assault (First Degree), Capital Murder, and Escape (Third Degree). When asked about his criminal history, Mr. Wood stated that he had been arrested for "lots of stuff" during his teen years but denied his involvement in the majority of these crimes. He did admit to his involvement in the Assault for which he was convicted and sentenced to 15 years.

Available information suggests that Mr. Wood did not suffer from a substance abuse disorder nor did he have a habit of using substances to excess. He admitted that he drank beer and whisky but noted that his use was limited to social drinking. There is contradictory information regarding the possibility that Mr. Wood had tried marijuana. While he denied this allegation, his sister reported that he once had his parole revoked because they found traces of drugs in his urine. When questioned about this the respondent stated that he had not smoked marijuana and attributed the results to the presence of over the counter cold medicine in his system.

Review of available medical records does not suggest the presence of any life threatening illnesses or severe forms of psychiatric disturbance. There is record of Mr. Wood having been treated with the following medications, some in combination: Inderal, Desyrel (also known as Trazedone), and Elavil (avail-

able records include the years from 1994 to 2000). The information provided in the records is considered to be incomplete in that there is no explanation of the rational for these medications. Among some of the indications for these medications are high blood pressure, depression, anxiety, sleep disturbance, headaches, and panic attacks. It can be inferred from medical notes that Mr. Wood had experienced significant sleep disturbance and that he had once been diagnosed as having Adjustment Disorder with Depression.

Collateral information indicates that Mr. Wood did not receive treatment for mental health related concerns prior to his incarceration but after his incarceration recommendations were made for him to receive substance abuse counseling, stress management, reality therapy, values clarification, healthy use of leisure, personal development, and treatment for anger induced acting out. Evaluations conducted during his incarcerations indicate that he has been diagnosed with antisocial personality disorder, and borderline intellectual functioning with no signs of emotional disturbance.[2] In the recommendation section of the 1991 Interview/Data Entry Form there is notation stating that Mr. Wood's intellectual functioning is relatively low and that his prognosis for adaptive functioning was very poor at that time. In addition, the WAIS IQ scores were reported for the respondent on each of the forms. The scores are as follows[3]

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[2] This information was obtained from Psychological Interview/Data Entry forms dated 03-29-85, 11-13-91, and 02-24-95.

[3] Due to limited information, the assumption made was that the first number represents Verbal IQ, the second number

1985 - 77 / 78 / 73
1991 - 72 /78 /73
1995 - 73 / 67 / 69

Mr. Wood's reading level was also reported on these forms and was identified to be at the 5th grade level in 1995, 4th grade level in 1985, and at the less than 3rd grade level in 1991. Current medical records for Mr. Wood were requested by not obtained by the time of writing. As such, no comments are made with respect to his current treatment regimen or any psychiatric diagnoses that he may have.

With regard to other medical problems, Mr. Wood indicated that he currently suffers from a long standing "urinary problem" that results in his having to urinate frequently. The respondent could not provide more detailed information and, in the *absence* of medical records, nothing more is known of this claim. There were no reports of head injury or severe trauma related to accidents involving Mr. Wood. Neither sister was sure if Mr. Wood was in the car accident that took the life of his brother and as such, no comment can be made regarding this incident.

OBSERVATIONS/MENTAL STATUS

The current evaluation was conducted over the course of a single session that took approximately seven hours to complete. The location for the evaluation was the visiting room of Holman Prison with only the respondent and the examiner in attendance. The conditions of the testing environment were not ideal due to the noise caused by multiple large fans

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represents Performance IQ, and the third number represents Full Scale IQ. This assumption is based on the standard protocol for reporting IQ scores.

located in the room and mild discomfort related to the temperature of the environment. While not ideal, the conditions were satisfactory for completing the evaluation of Mr. Wood.

Mr. Wood's is a man of average height and medium build who wears his hair short and trimmed close to his head. He presented well groomed and dressed appropriately in standard prison uniform. His attitude can be described as cooperative and engaged and there was no evidence of impairment in the areas of concentration, attention, and memory. There were no overt signs of disturbance of thought or orientation. The respondent's affect can be described to be within normal limits and of full range. Mr. Wood denied having any current thoughts or plans to harm himself or someone else.

CLINICAL ASSESSMENT

Results of Psychological Tests/Procedures

Cognitive Functioning

Mr. Wood was administered the Stanford Binet Intelligence Scales (Fifth Edition; SB-5). The choice to use the SB-5 was based on the observation that Mr. Wood had been tested two to three times with the Wechsler Adult Intelligence Scale. The potential effect of re-testing using the same instrument is an increase in test scores with each subsequent administration. The use of the most recent version of the Stanford Binet Intelligence Scale (published in 2003) reduces the possibility of practice effects.

Mr. Wood scores on the SB-5 were as follows: Verbal IQ = 66 (95% confidence interval 61 to 73), Nonverbal IQ = 56 (95% confidence interval 52 to 64), and Full Scale IQ = 59 (95% confidence interval 56 to 64). Standard scores on the subtests ranged from 60 to 74.[4] There was no evidence of intra-subtest or intra-subtest scatter, which suggests that the VIQ, the NVIQ, and the FIQ have provided meaningful estimates of functioning within each domain. In other words, domain scores are not artificially elevated or reduced due to scores on one or more subtests. Overall, the results of testing suggest that the respondent shows a particular strength in the verbal *over* the nonverbal domain and demonstrates a relative strength in the area of verbal fluid reasoning. Relative weaknesses were noted in the areas of nonverbal fluid reasoning and verbal visual-spatial processing. Mr. Wood's ability to reason (both inductively and deductively) and to identify relations among pieces of

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[4] Please see Appendix A for a complete listing of scores, percentile ranks, and confidence intervals.

information using verbal mechanisms is his most advanced skill as measured by the SB-5. In contrast, relative to his other capabilities, Mr. Wood's ability to reason and to infer relationships using patterns or symbols are significantly lower. According to the DSM-IV, Mr. Wood's IQ scores all fall within the range of mild mental retardation.[5]

Based on the achievement screener (The Wide Range Achievement Test [WRAT3]), Mr. Wood's reading ability was assessed to be at the sixth grade level (4th percentile), his spelling was assessed to be at the third grade level (0.9th percentile), and his arithmetic score was assessed to be at the third grade level (0.8th percentile).

Test of Malingered Memory (TOMM)

The TOMM is a 50-item recognition test for adults, which includes two learning trials and a retention trial. The test is designed to assist clinicians in the assessment of malingered memory in adults. Mr. Wood's scores on all three trials of the measure suggest that he was putting forth his best effort (40/50, 45/50 and 48/50 respectively) with no indication that he was malingering memory impairment.

The Instruments for Assessing Understanding & Appreciation of Miranda Rights

This measure includes four instruments: Comprehension of Miranda Rights (CMR), Comprehension of Miranda Rights-Recognition (CMR-R), Comprehension of Miranda Vocabulary (CMV), and Function of Rights in Interrogation (FRI). These instruments are

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[5] Please sec Appendix B for a complete listing of significant differences between domains, factor Index scores, and single subtest scores.

used to examine the capacities of individual youths or adults who have waived their Miranda rights at the time of their police interrogation. Mr. Wood was administered all four instruments and the results suggest that he has an adequate understanding an appreciation of his Miranda rights as measured by these instruments (CMR score = 8/8; CMR-R score = 12/12; CMV score = 9/12; FRI score = 24/30).

AAMR Adaptive Behavior Scale—Residential and Community: Second Edition (ABS-RC:2)

The ABS-RC:2 is a comprehensive measure of adaptive functioning that was normed on over 4000 persons with mental retardation from across the United States. As such, the values obtained are compared to individuals already diagnosed as having mental retardation, not to a normative sample. The scale is divided into two parts. Part One focuses on independence and; is designed to evaluate coping skills considered to be important to personal independence and responsibility in daily living. There are 10 behavior domains and 21 sub-domains in Part One. Part Two of the scale is concerned with social behavior and these behaviors are grouped into eight domains. These eight domains relate to the manifestation of personality and behavior disorders.[6]

Mr. Wood's scores on the ABS-RC:2 suggest impairment in five domains on Part One and eight domains on Part Two. He scored in the "average range" on Domestic Activity (75th percentile; age equivalent of 8-3 years), Self-Direction (50th percen-

[6] Please see Appendix C for a complete description of the domains and sub-domains assessed by the ABS-RC:2. Sub-domains identified in the average to poor range are indicated with an asterisk.

tile; age equivalent of less than 3-0 years), Responsibility (50th percentile; age equivalent of 5-3 years), and Socialization (63rd percentile; age equivalent of less than 3-0 years). Mr. Wood scored in the "poor range" on Prevocational/Vocational Activity (5th percentile; age equivalent of 3-6 years). On Part Two of the test, all of the respondent's scores fell were in the range of "average" to "poor."

Factor Scores on the ABS-RC:2

The ABS-RC:2 has been identified as having three factors on Part One and two factors on Part Two. Part One factors are titled as Personal Self-Sufficiency, Community Self-Sufficiency, and Personal-Social Responsibility. Part Two factors are titled Social Adjustment and Personal Adjustment. It is important to remember that all comments regarding Mr. Wood are made in comparison to a sample of persons already diagnosed as having mental retardation. Thus, high scores indicate that his functioning better than most people who have mental retardation and low scores indicate that his functioning is worse than most people who have mental retardation.

Part One: Mr. Wood's Personal Self-Sufficiency Quotient indicates that he has the abilities that are required to live alone or in a community based residential facility. His Community Self Sufficiency Quotient was suggests that it is unlikely that he needs to be taught behaviors associated with community integration and his Personal-Social Responsibility Quotient indicates that he has the minimal abilities required to conform to society's interpersonal demands.

Part Two: Mr. Wood's Social Adjustment Quotient is reflective of an individual who is aggressive, exhibits anti-social behavior, and has inappropriate in-

terpersonal relations. His score indicates very poor performance and individuals who score at this level tend to act out and are often rebellious, untrustworthy, and unpredictable in relationships. The respondent's Personal Adjustment Quotient fell within the average range suggesting that it is unlikely that he exhibits severely inappropriate interpersonal behaviors.

Taken together, the results of the ABS-RC:2 suggest mild impairment in a variety of domains of adaptive functioning and that Mr. Wood's skills are comparable to those of a person with mild mental retardation.

SUMMARY AND CONCLUSIONS

Mr. Wood is a 43 year-old, African American man who is currently residing in Holman Prison in the State of Alabama. Mr. Wood was found guilty of Capital Murder in 1994 and was sentenced to death by electrocution for his involvement in this crime. The current evaluation was requested by Mr. Wood's defense team and as part of an upcoming Rule 32 hearing. Mr. Wood was evaluated for the purpose of assessing his cognitive abilities, his adaptive functioning, and his understanding of Miranda Rights. He was also assessed with an instrument designed to detect malingering of intellectual impairment (the TOMM) and his sister, Johnnie Pearl Wood, acted as a rater to assist in the determination of the respondent's adaptive functioning.

With regard to his intellectual functioning, Mr. Wood's IQ scores the SB-5 place him in the range of mild mental retardation and his scores on the achievement screener indicate that he has significant deficits in his ability to read (6th grade level), spell

(3rd grade level), and complete mathematical problems (3rd grade level). In comparison with available information, the respondent's reading level reflects his highest score to date. As mentioned previously, Mr. Wood obtained the following IQ scores during prior test sessions using the WAIS: (1) 1985 = 77 / 78 / 73, (2) 1991 = 72 / 78 / 73, and (3) 1995 = 73 / 67 / 69. It should be noted that it appears that the scores reported on the 1991 form are simply a notation reflecting scores obtained in 1985 with a data entry error on one of the two forms. Regardless, the full scale IQ's obtained by Mr. Wood indicate that he has either borderline intellectual functioning or mild mental retardation. When considering the standard error of measurement (not available on the forms), it is possible that scores are actually somewhat higher or lower than these stated values (for example, on the WAIS-III a Full Scale IQ of 69 has a 95% confidence interval of 66-74). His scores on the SB-5 obtained during the current evaluation identify him as having mild mental retardation. Using the 95% confidence interval, Mr. Wood's Full Scale IQ remains in this range with a lower limit identified as 56 with an upper limit of 64.

As noted in the body of the report, Mr. Wood evidenced deficits in adaptive functioning as identified on the ABS-RC:2. Again, his scores on many of the behavior domains and sub-domains indicate that he scores equal to or lower than other individuals that have already been diagnosed with mental retardation. Specifically, the results of this instrument suggest that, without assistance, Mr. Wood would likely have trouble carrying out some of the tasks of daily life (e.g., cleaning, cooking). His lack of attention to timeliness and attention to detail would greatly interfere with his ability to secure and main-

tain employment, as would his propensity to being irresponsible and undependable. In addition, the results indicate that Mr. Wood lacks self-directedness, is likely to have impaired social relationships, and the use of threats or aggression may be a typical mode of interaction. The findings are considered to be consistent with historical information provided by the defendant and collateral sources, as well as information gleaned from documents that were reviewed for this case.

As applied to the current case, these findings suggest that Mr. Wood meets criteria for having mild mental retardation and that he has shown the requisite deficits in adaptive functioning with limited IQ before the age of 18 years.

This report has been produced following psychological evaluation of the referred parties and is intended only as a summary of those findings that are of relevance to the current legal proceedings. Should the Court require additional information, please contact the undersigned.

Respectfully submitted,

/s/ Karen Salekin, Ph.D.
Karen Salekin, Ph.D.
Clinical and Forensic Psychologist
Alabama License # 1148

APPENDIX A

STANDARD SCORES, PERCENTILE RANKS AND CONFIDENCE INTERVALS ON THE SB-5

	STANDARD SCORE	PERCENTILE RANK	CONFIDENCE INTERVAL (95%)
VERBAL IQ (VIQ)	66	1.0	61 to 73
NON-VERBAL IQ (NIQ)	56	0.2	52 to 64
FULL SCALE IQ (FIQ)	59	0.3	56 to 64
FLUID REASONING	68	2.0	63 to 79
KNOWLDEGE	74	4.0	68 to 84
QUANTITATIVE REASONING	72	3.0	66 to 82
VISUAL-SPATIAL PROCESSING	65	1.0	60 to 76
WORKING MEMORY	60	0.4	56 to 72

APPENDIX B

SIGNIFICANT DIFFERENCES BETWEEN DOMAINS, FACTOR SCORES, AND SINGLE SCALED SUBTESTS ON THE SB-5

SB-5 IQ Scores	NVIQ significantly lower than VIQ	10
SB-5 Factor Index scores	No significant differences	-
SB-5 Single Subtest Scaled Scores and the Average Score of Subtests	Nonverbal: : Fluid Reasoning is lower than the average :Verbal-Spatial Processing is higher than the average Verbal: : Fluid Reasoning is higher than the average : Visual Spatial Processing is lower than the average	 2.9 3.1 4.1 2.9
SB-5 Subtest Scaled Score	Nonverbal Fluid Reasoning is: :less than Nonverbal Knowledge :less than Nonverbal Quantitative Reasoning :less than Nonverbal Visual-Spatial Processing :less than Verbal Fluid Reasoning :less than Verbal Knowledge :less than Verbal Quantitative Reasoning Nonverbal Quantitative Reasoning: :greater than Verbal Visual-Spatial Processing	 4.0 4.0 6.0 7.0 5.0 4.0 4.0

	Nonverbal Visual-Spatial Processing:	
	:greater than Nonverbal Working Memory	4.0
	:greater than Verbal Visual-Spatial Processing	6.0
	:greater than Verbal Working Memory	4.0
	Nonverbal Working Memory is:	
	:less than Verbal Fluid Reasoning	5.0
	:less than Verbal Knowledge	3.0
	Verbal Fluid Reasoning is:	
	:greater than Verbal Visual-Spatial Processing	7.0
	:greater than Verbal Working Memory	5.0
	Verbal Knowledge is:	
	:greater than Verbal Visual-Spatial Processing	5.0
	Verbal Quantitative Reasoning is:	
	:greater than Verbal Visual-Spatial Processing	4.0

APPENDIX C

DESCRIPTION OF DOMAINS AND SUBDOMAINS ON THE ADAPTIVE BEHAVIOR SCALE—RESIDENTIAL AND COMMUNITY VERSION 2 (ABS-RC:2)

I. Independent living: A. Eating B. Toilet Use C. Cleanliness D. Appearance E. Care of Clothing F. Dressing and Undressing G. Travel H. Other Independent Functioning	XI. Social Behavior* This domain relates to personal behaviors that are physically or emotionally abusive (e.g., threatening others, losing control of ones temper, and disrupting others)
II. Physical Development A. Sensory Development B. Motor Development	XII. Conformity* This domain examines several aspects of rebelliousness including impudence, tardiness or absence, and misbehavior.
III. Economic Activity A. Money Handling and Budgeting B. Shopping Skills	XIII. Trustworthiness* This domain looks at behaviors related to stealing, lying, cheating, and showing respect for public and private property.
IV. Language Development A. Expression B. Verbal Comprehension C. Social Language	XIV. Stereotyped and Hyperactive Behavior* This Domain eva-

Development	luates the presence of behaviors that are disconcerting or upsetting to others (e.g., making inappropriate physical contact, being overly active).
V. Numbers and Time This domain assess basic mathematical competencies with particular interest in the skills that allow one to function in everyday living (e.g., telling time, performing basic arithmetic).	XV. Sexual Behavior* This domain relates to behaviors that relate to masturbating at inappropriate times or places, removing clothing at improper times, and participating in sexual activities in socially unacceptable ways.
VI. Domestic Activity A. Cleaning B. Kitchen C. Other Domestic Duties	XVI. Self Abusive Behavior* Behaviors that cause harm to oneself or that are deemed as bizarre or against the norm.
VII. Prevocational/ Vocational Activity* This domain examines a person's ability to function within a job or school setting (e.g., tardiness, habitual absence, or carelessness)	XVII. Social Engagement* This domain helps to determine the degree to which a person withdraws from activities or fails to respond to others.

VIII. Self-Direction* A. Initiative B. Perseverance C. Leisure Time	XVIII. Disturbing Interpersonal Behavior* This domain assesses behaviors that are bothersome or annoying to others such as constantly overestimating ones abilities, feeling persecuted and reacting poorly to criticism.
IX. Responsibility* This domain examines a person's dependability. In particular, the ability to take care of ones own possessions, carrying out assigned tasks, being punctual and maintaining self-control.	
X. Socialization This domain examines an individual's ability to interact with others. The domain explores social aspects of behaviors such as cooperation and consideration.	

*denotes areas of deficient adaptive functioning

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CONFIDENTIAL

FORENSIC PSYCHOLOGICAL EVALUATION

Re: Hollie Wood
Case Number: CC92-3
Date of Evaluation: June 29, 1992
Date of Report: June 30, 1992

Referral Information: Hollie Wood is a thirty-one year old (DOB: [REDACTED], single, black male who was referred for an evaluation of his mental state at the time of the offense regarding the charge of Escape, Third Degree, Pike County case number CC92-3. The order for evaluation was signed by the Honorable John B. Crawley, Circuit Court Judge for Pike County, Alabama.

Notification: Prior to undertaking the interview, Mr. Wood was informed of the purpose of the evaluation and the issue of limited confidentiality with respect to the Court. He was advised that information obtained during the interview would help the examiner determine his mental state at the time of the alleged offense. Mr. Wood was also informed that my clinical findings would be related to the Court in the form of a written report and, possibly, oral testimony. Mr. Wood understood this advisement and consented to the interview on that basis.

Summary of Offense: According to collateral information, on September 17, 1991, the defendant was detained by city of Troy police officer for speeding.

Reportedly, after the defendant stopped his motor vehicle and began to interact with the officer, he allegedly fled from the officer on foot.

Clinical Assessment: Procedures used in the current evaluation involved an interview with the defendant and a review of collateral information regarding the alleged offense. Prior to describing Mr. Wood's clinical presentation, it is important to note that he informed the examiner that he progressed in school up to the tenth grade before dropping out. Mr. Wood told the examiner that he had never been enrolled in special education classes but did take a basically vocational rather than college prepatory curriculum. He admitted that he used alcohol but that this was not a problem for him and denied any prior history of drug abuse, suicidality, or prior psychiatric treatment. He stated that he was arrested on several prior occasions for misdemeanor charges and in 1984 was convicted on an assault charge which resulted in his serving five years in the Alabama state Department of Corrections. Mr. Wood reports that he was put on parole at the time he picked up his current charge. The defendant reported no significant history of prior medical difficulties.

Mr. Wood was interviewed on June 29, 1992, for the purpose of a mental status examination and a forensic evaluation. At that time he was appropriately dressed and groomed and looked his stated age. He was a man of average height and medium build, having medium length hair and long sideburns. He cooperated fully with the evaluation process and seemed to interact well with the examiner. . He was oriented as to person, place, time, and date. Both his recent and remote memory capacities appeared to be fully intact. Mr. Wood appeared to have the capacity

to concentrate adequately on the tasks at hand and was thought to be functioning within the borderline range of general intelligence. His speech was clear, coherent, and goal-directed. Structure of thought was normal and ideas were meaningfully associated. Mr. Wood denied currently experiencing any abnormalities of thought content or perception such as suicidal ideation, delusional thinking, or hallucinations. The defendant also assured the examiner that he had never experienced any such phenomena in the past. Eye contact was easily established and maintained with the defendant whose mannerisms were socially appropriate throughout the interview. He used a few hand gestures while speaking and maintained a normal facial expression. His mood appeared calm. Mr. Wood reported no abnormalities of sleep or appetite. His affective presentation was considered to be normal, appropriate, and congruent with mood and content of thought. In summary, Mr. Wood's current mental status appeared to be essentially normal except for the possibility that he was functioning within the borderline range of general intelligence.

Forensic Assessment:

Mental State at the Time of the Offense: Mr. Wood declined to provide a detailed account of the incident in question; however, assured the examiner that he had never experienced symptoms of psychiatric disorder at any time in the past and was certain that he did not experience such symptoms on the day of the offense. He also reported that he was always aware that to "escape from law enforcement is against the law." As such, it is unlikely that Mr. Wood experienced symptoms of severe psychiatric disorder at the time of the alleged offense.

Summary and Conclusions: Mr. Wood's current mental status appears essentially normal except for the possibility that he functions within the level of borderline intelligence. He appeared free from any debilitating symptoms of psychiatric disorder and advised this examiner that he had never experienced symptoms of mental illness at any time in the past. His report of his own mental state at the time of the offense did not suggest that he was suffering from symptoms of a mental illness on that day.

As a forensic psychologist, I recognize and respect that decisions regarding a criminal defendant's mental state at the time of the offense are decisions to be made by the Court. As such, I regard my opinions to be advisory only. Should more information be required, I would be happy to provide whatever medical records or expert testimony the Court deems necessary.

/s/ Michael T. D'ERRICO, Ph. D.
Michael T. D'ERRICO, Ph. D
Certified Forensic Examiner
Alabama Lic. #600

REPORT OF ADAPTIVE BEHAVIOR TESTING

NAME: Wood, Holly
DATE or TESTING: 07/29/2003
DATE OF BIRTH: [REDACTED]
AGE: 43 years 1 month
ORGANIZATION: Donaldson Prison
RESPONDENT: Willie Ryans
EXAMINER: H. McClaren

TEST ADMINISTERED

Holly's adaptive behavior was evaluated using the Scales of Independent Behavior—Revised (SIB-R)

ADAPTIVE BEHAVIOR

Broad Independence is a measure of overall adaptive behavior based on an average of four different areas of adaptive functioning: motor skills, social interaction and communication skills, personal living skills, and community living skills. Holly's functional independence is limited to age-appropriate; his performance is comparable to that of the average individual at age 17 years 11 months (17-11). This is within the low average range of scores obtained by others at his age level, as shown by his percentile rank (11) and standard score (81).

Motor Skills includes gross—and fine-motor proficiency tasks involving mobility, fitness, coordination, eye-hand coordination, and precise movements. Holly's motor skills are age-appropriate; his performance is comparable to that of the average individual at age 14-2. Motor tasks below the age 10-8 level will be quite easy for Holly. The point at which he will find motor tasks difficult is above the median for individuals at age 36.

When presented with age-level tasks, Holly's gross-motor skills are limited to age-appropriate.

Age-level tasks involving balance, coordination, strength, and endurance will be difficult for him.

When presented with age-level tasks. Holly's fine-motor skills are age-appropriate. Age-level tasks requiring eye-hand coordination using the small muscles of the fingers, hands, and arms will be manageable for him.

Social Interaction and Communication Skills measures Holly's interactions with others in various social settings and his understanding and communication, of information through signs, oral expression, or written symbols. Holly's social interaction and communication skills are limited to age-appropriate; his performance is comparable to that of the average individual at age 18-5. Similar tasks below the age 13-6 level will be quite easy for Holly; those above the age 34 level will be quite difficult for him.

When presented with age-level tasks, holly's social interaction skills are limited to age-appropriate. Age-level tasks involving social interaction with other people will be difficult for him.

When presented with age-level tasks, Holly's language comprehension skills are limited. Age-level tasks involving understanding signals, signs, or speech and in deriving information from spoken and written language will be very difficult for him.

When presented with age-level tasks, Holly's language expression skills are limited to age-appropriate. Age-level tasks involving talking and other forms of expression will be difficult for him.

Personal Living Skills includes adaptive behaviors related to eating and preparing meals, taking care of personal hygiene and appearance, and maintaining

an orderly home environment. Holly's personal living skills are limited to age-appropriate; his performance is comparable to that of the average individual at age 27. Similar tasks below the age 17-10 level will be quite easy for Holly. The point at which he will find similar tasks difficult is above the median for individuals at age 45.

> When presented with age-level tasks, Holly's eating and meal preparation skills are limited to very limited. Age-level tasks involving eating and meal preparation will be very difficult to extremely difficult for him.
>
> When presented with age-level tasks. Holly's toileting skills are age-appropriate. Age-level tasks involving using the toilet and bathroom will be manageable for him.
>
> When presented with age-level tasks, Holly's dressing skills are age-appropriate. Age-level tasks involving performance in dressing will be manageable for him.
>
> When presented with age-level tasks. Holly's personal self-care skills are limited to age-appropriate. Age-level tasks involving basic grooming and health-maintenance tasks will be difficult for him.
>
> When presented with age-level tasks, Holly's domestic skills are limited. Age-level tasks involving home maintenance will be very difficult for him.

Community Living Skills measures the skills Holly needs to successfully use community resources, perform in an employment setting, and assume other social and economic requirements encountered in community settings (including tasks involving time

and punctuality, money and value, work skills, and home and community orientation). Holly's community living skills are limited; his performance is comparable to that of the average individual at age 14-11. Similar tasks below the age 12-1 level will be quite easy for Holly; those above the age 20 level will be quite difficult for him.

When presented with age-level tasks, Holly's time and punctuality skills are limited. Age-level tasks involving time and time concepts will be very difficult for him.

When presented with age-level tasks, Holly's money and value skills are limited. Age-level tasks related to determining the value of items and using money will be very difficult for him.

When presented with age-level tasks, Holly's work skills are limited to very limited. Age-level work habits and prevocational skills will, be very difficult to extremely difficult for him.

When presented with age-level tasks, Holly's home and community orientation skills are very limited. Age-level tasks related to getting around the home, neighborhood, or traveling in the community will be extremely difficult for him.

ADAPTIVE BEHAVIOR STRENCTHS AND WEAKNESSES

Comparisons among Holly's adaptive behavior domain scores help to determine if any strengths and weaknesses exist. Inspection of these scores shows significant variability in performance. Holly's greatest strengths include his motor skills. His lowest scores include his community living skills.

SUMMARY

Holly's Broad Independence, an overall measure of adaptive behavior, is comparable to that of the average individual at age 17 years 11 months. His functional independence is limited to age-appropriate.

When presented with age-level tasks, Holly's motor stills are age-appropriate. His social interaction and communication skills and personal living skills are limited to age-appropriate. Holly's community living Skills are limited.

> Holly has limitations in seven adaptive skill areas: language comprehension, eating and meal preparation, domestic skills, time and punctuality, money and value, work skills, and home/community orientation.

Holly's greatest strengths include his motor skills. His lowest scores include his community living skills.

/s/ H. McClaren
H. McClaren
Examiner

TABLE OF SCORES: Scales of Independent Behavior—Revised

TABLE OF SCORES: Scales of Independent Behavior--Revised

CLUSTER/Subscale	AE	Developmental Zone Easy	Diff	PR	SS	SS Band	BMI	Skill with age-level tasks
BROAD INDEPEND	17-11	13-5	3+	11	81	79-83	73/90	ltd to age-app
MOTOR SKILLS	14-2	10-8	36(78)	31	93	87-99	84/90	age-appropriate
Gross-Motor	9-3							ltd to age-app
Fine-Motor	16-10							age-appropriate
SOCIAL/COMM	18-5	13-6	3+	15	85	80-90	73/90	ltd to age-app
Social Inter	18-11							ltd to age-app
Language Comp	16-1							limited
Language Expr	18-0							ltd to age-app
PERSONAL LIVING	27	17-10	45[79]	27	91	88-94	81/90	ltd to age-app
Eating	14-10							ltd to very ltd
Toileting	56[80]							age-appropriate
Dressing	53[88]							age-appropriate
Self-Care	35							ltd to age-app
Domestic Skills	24							limited
COMM LIVING	14-11	12-1	20	2	68	64-72	45/90	limited
Time and Punc	14-6							limited
Money and Value	15							limited
Work Skills	13-0							ltd to very ltd
Home-Community	14-5							very limited

REPORT OF ADAPTIVE RERAVIOR TESTING

NAME: Wood, Holly
DATE or TESTING: 07/29/2003
DATE OF BIRTH: [REDACTED]
AGE: 43 years 1 month
ORGANIZATION: Donaldson Prison
RESPONDENT: Willie Ryans
EXAMINER: H. McClaren

TEST ADMINISTERED

Holly's adaptive behavior was evaluated using the Scales of Independent Behavior—Revised (SIB-R)

SUMMARY

Holly's Broad Independence, an overall measure of adaptive behavior, is comparable to that of the average individual at age 17 years 11 month. His functional independence is limited to age-appropriate.

When presented with age-level tasks, Holly's motor skills are age-appropriate. His social interaction and communication skills and personal living skills are limited to age-appropriate. Holly's community living skills are limited.

> Holly has limitations in seven adaptive skill areas: language comprehension, eating and seal preparation, domestic skills, time and punctuality, money and value, work skills, and home /community orientation.

Holly's greatest strengths include his motor skills. His lowest scores include his community living skills.

/s/ H. McClaren
H. McClaren
Examiner

COURT OF CRIMINAL APPEALS OF ALABAMA.

CR-01-0700
Jan. 6, 2004

HOLLY WOOD

v.

STATE OF ALABAMA.

On Return to Remand

BASCHAB, Judge.

On April 25, 2003, we remanded this case to the circuit court with instructions that that court determine whether the appellant, Holly Wood, is mentally retarded and whether his trial attorneys rendered ineffective assistance by not developing and presenting evidence that he is mentally retarded. On remand, the circuit court conducted an evidentiary hearing and entered an extensive order in compliance with our instructions. Afterward, the appellant submitted a brief in which he raised arguments concerning the remand proceedings. We now address the remaining arguments he raised in his brief on original submission and the arguments he raises in his brief on return to remand.

The appellant raises numerous arguments, including claims that his attorneys rendered ineffective assistance during the proceedings. In reviewing the circuit court's rulings on the appellant's arguments, we apply the following principles:

> "'"[T]he plain error rule does not apply to Rule 32 proceedings, even if the case involves the death sentence." *Thompson v. State*, 615 So.2d 129 (Ala.CrApp.1992).' *Cade v. State*, 629 So.2d 38, 41 (Ala.Crim.App.1993), *cert. denied*, 1511] U.S. [1046], 114 S.Ct. 1579, 128 L.Ed.2d 221 (1994). "In addition, '[t]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.' *State v. Tarver*, 629 So.2d 14, 19 (Ala. Crim.App.1993)." *Brownlee v. State*, 666 So.2d 91, 93

(Ala. Crim.App .1995).

> "To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and (2) that he was prejudiced as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
>
> "'The appellant must show that his counsel's performance was unreasonable, considering all of the attendant circumstances . . . . "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.'

"*Duren v. State*, 590 So.2d 360, 362 (Ala.Cr.App. 1990), *aff'd*, 590 So.2d 369 (Ala.1991), *cert. denied*, [503] U.S. [974], 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992).

> "When this court is reviewing a claim of ineffective assistance of counsel, we indulge a strong presumption that counsel's conduct was appro-

priate and reasonable. *Luke v. State*, 484 So.2d 531, 534 (Ala.Cr.App.1985). The burden is on the appellant to show that his counsel's conduct was deficient. *Luke*.

"'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"*Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065- 66. (Citations omitted.) *Ex parte Lawley*, 512 So.2d 1370, 1372 (Ala.1987).

"Initially we must determine whether counsel's performance was deficient. We must evaluate whether the action or inaction of counsel of which the petitioner complains was a strategic

choice. 'Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable. . . .' *Lawley*, 512 So.2d at 1372. This court must avoid using 'hindsight' to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance. *Falkner v. State*, 586 So.2d 39 (Ala.Cr.App.1991)."

Hallford v. State, 629 So.2d 6, 8-9 (Ala.Crim.App. 1992).

"In determining whether a defendant has established his burden of showing that his counsel was ineffective, we are not required to address both considerations of the *Strickland v. Washington* test if the defendant makes an insufficient showing on one of the prongs. *Id.* at 697, 104 S.Ct. at 2069. In fact, the Court explained that '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' *Id.* We defer to this guidance and address the 'prejudice' prong, for '[w]ith respect to the prejudice component, the lack of merit of [Thomas's] claim is even more stark.' *Id.* at 699, 104 S.Ct. at 2070."

Thomas v. State, 511 So.2d 248, 255 (Ala.Crim.App. 1987) (footnote omitted).

"Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal. *Holladay v. State*, 629 So.2d 673 (Ala.Cr.App.1992), *cert. denied*, 510 U.S. 1171,

114 S.Ct. 1208, 127 L.Ed.2d 555 (1994); *McCoy v. Lynaugh*, 874 F.2d 954, 965-66 (5th Cir. 1989). Rather, counsel must be given some discretion in determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success. *Heath v. State*, 536 So.2d 142 (Ala.Cr.App.1988); *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)."

Davis v. State, 720 So.2d 1006, 1014 (Ala.Crim.App. 1998).

I.

The appellant argues that he is mentally retarded, that his attorneys rendered ineffective assistance by not developing and presenting evidence that he is mentally retarded, and that his attorneys rendered ineffective assistance by not requesting a jury instruction on mental retardation. On remand, in a thorough 57-page order, the circuit court made extensive findings concerning the appellant's contentions that he is mentally retarded and that his attorneys rendered ineffective assistance by not developing and presenting evidence that he is mentally retarded. In that order, the circuit court concluded that the appellant did not establish that he is mentally retarded and therefore did not establish that his attorneys rendered ineffective assistance by not developing and presenting evidence that he is mentally retarded. The record supports those

findings, and we adopt them as part of this opinion.[1] Therefore, we conclude that the appellant's arguments in this regard are without merit.

In his brief on remand, the appellant argues that the circuit court did not apply the correct standard in determining whether he is mentally retarded; improperly required him to establish that he is mentally retarded by a higher standard than a preponderance of the evidence; and improperly found that he is not mentally retarded. He also argues that the Sixth Amendment requires that his sentence be vacated and that a new sentencing hearing be conducted so a jury can determine whether he is mentally retarded. However, he did not first present any of these arguments to the circuit court. Therefore, they are not properly before this court. *See Fincher v. State*, 724 So.2d 87 (Ala.Crim.App.1998).

The appellant further argues that, on remand, the State improperly refused to withdraw its threat to prosecute his expert if she testified during the evidentiary hearing. However, before the evidentiary hearing started, the State indicated that it did not have any intention of prosecuting the expert witness if she testified. Therefore, the record refutes the appellant's argument.

II.

The appellant also argues that the attorney who acted as his lead counsel during the penalty phase of his trial "was *per se* ineffective by virtue of his inexperience and non-compliance with governing

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[1] We have taken judicial notice of the record from the appellant's direct appeal in this case. *See Nettles v. State*, 731 So.2d 626 (Ala.Crim.App.1998).

Alabama law." (Appellant's brief at p. 31.) Specifically, he contends that one of his trial counsel had practiced as an attorney only five months when he was appointed to handle this case. However, he did not present this argument in any of his petitions or during the evidentiary hearing. Rather, he raised it only in his post-hearing brief. Therefore, it is not properly before this court. *See Morrison v. State*, 551 So.2d 435 (Ala.Crim.App.1989).

Moreover, the appellant was also represented by two other attorneys who each had more than five years of experience in the practice of criminal law. Therefore, the requirements of §13A-5-54, Ala. Code 1975, were satisfied in this case, and the appellant's argument is without merit. *See Parker v. State*, 587 So.2d 1072 (Ala.Crim.App.1991).

III.

The appellant further argues that his attorneys rendered ineffective assistance in numerous instances.

A.

First, the appellant contends that his attorneys rendered ineffective assistance because they allegedly did not investigate and present sufficient mitigating evidence during the penalty phase of his trial. In support of his contention, he makes reference to additional evidence that he contends is mitigating and that he contends his attorneys could have presented during the penalty phase of his trial.

In *Daniels v. State*, 650 So.2d 544, 568-70 (Ala. Crim.App.1994), we stated the following regarding a claim that trial counsel had rendered ineffective

assistance during the penalty phase of a capital murder trial:

> "In determining whether Haas was ineffective at original sentencing, . . . we recognize that the "'two-pronged *Strickland* analysis applies whether the ineffectiveness complained of occurred in the defendant's trial or in a subsequent adversarial sentencing proceeding. However, in a challenge to the imposition of a death sentence, the prejudice prong of the *Strickland* inquiry focuses on whether "the sentences . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'"

"*Stevens v. Zant*, 968 F.2d 1076, 1081 (11th Cir.1992) (citation omitted), cert. denied, 1-5071 U.S. [929], 113 S.Ct. 1306, 122 L.Ed.2d 695 (1993). We also recognize that

> "'[w]hile [i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness," *see Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.1985), it is unclear how detailed an investigation is necessary to provide a defendant with the effective assistance of counsel. *Strickland* only requires that counsel's actions fall within the wide spectrum of what can be considered reasonable assistance of counsel.'"

White v. Singletam 972 F.2d 1218, 1224 (11th Cir. 1992). The principles regarding an attorney's duty to conduct an investigation into mitigating evidence have been summarized as follows:

"'An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir.1986). First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. *Funchess v. Wainwright*, 772 F.2d 683, 689-90 (11th Cir. 1985). If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.'"

Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir.1988).

"Applying the foregoing principles to the issue of whether Haas provided effective assistance of counsel at original sentencing, we conclude that the appellant's claim is without merit. Although the defense called only one witless at the sentencing hearing, that witness was Mrs. Hebert, the appellant's mother, who pleaded for the appellant's life. Mrs. Hebert had retained Haas, conferred with him at length, paid all his trial fees, and, by the time of sentencing, had exhausted her funds. The circuit court's

sentencing order stated that 'it is apparent to the court that [Mrs. Hebert] was devoted to [the appellant].'

"Since Haas had spoken with Mrs. Hebert about the appellant and had observed by her words and actions that she appeared to be 'devoted' to the appellant, we cannot fault Haas for failing to discover the appellant's 'traumatic' childhood, in which, according to later testimony by Dr. Herlihy, Mrs. Hebert's 'emotional rejection' of her son played a large part. *Compare Bertolotti v. Dugger*, 883 F.2d 1503, 1520 (11th Cir. 1989) (defense counsel held to have provided effective assistance on claim that counsel overlooked or failed to investigate evidence of defendant's traumatic childhood, where counsel interviewed defendant's parents), *cert. denied*, 497 U.S. 1031 [1032], 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990). *See also Beets v. Collins*, 986 F.2d 1478, 1488-89 (5th Cir.1993) (although counsel did not 'conduct a thorough investigation of [the defendant's] medical, mental, and psychological history,' which would have revealed that the defendant 'was raised in abject poverty, experienced a debilitating hearing loss, was afflicted with learning disabilities, had received head injuries as a child, and suffers from battered woman syndrome,' the court observed that the defendant never gave her attorney 'any hint that she had been abused by previous husbands or boyfriends. Neither [the defendant] nor any other member of her family ever conveyed to [the attorney] any information giving him reason to believe that she had a history of being physically abused.'), *rehearing granted*, 998 F.2d 253 (5th Cir.1993); *Cantu v. Collins*, 967 F.2d 1006, 1016 (5th Cir. 1992)

(despite fact that counsel failed to present evidence of defendant's 'low IQ, emotional immaturity, troubled youth, trauma as a result of his parents' divorce, and appearance of neglect,' court found that counsel had 'thoroughly investigated these claims, consulting with his client as well as [client's] father and brother for possible mitigating evidence,' and the claims were not supported in fact), *cert. denied*, [509] U.S. [926], 113 S.Ct. 3045, 125 L.Ed.2d 730 (1993); *Wilkerson v. Collins*, 950 F.2d 1054, 1064-65 (5th Cir. 1992) (although attorney failed to discover or develop mitigating evidence that defendant had a 'deprived family background,' and psychological and mental 'limitations,' the court observed that 'trial counsel interviewed [the defendant], his mother, and other relatives. Neither [the defendant] nor his relatives were able to supply the names of potential defense witnesses. Investigation did not reveal reason to suspect that [the defendant's] mental capacity was in any fashion impaired.), *cert. denied*, 15091 U.S. [921], 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993); *Thompson v. State*, 581 So.2d 1216, 1238 (Ala.Cr.App.1991) (upholding circuit court's finding that counsel, who presented only the testimony of defendant's mother at sentencing, was not ineffective for failing to present evidence of the defendant's violent family background, addiction and substance abuse), *cert. denied*, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992).

"We hold that Haas was not ineffective at the original sentencing proceeding." 650 So.2d at 568-70 (emphasis omitted). Also, counsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence.

"Although the failure to conduct a reasonable investigation of possible mitigating evidence may constitute ineffective assistance of counsel, 'counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation.' *Stanley v. Zant*, 697 F.2d 955, 965 (11th Cir.1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984)." *Lundy v. State*, 568 So.2d 399, 403 (Ala.Crim.App. 1990).

> "When a decision to not put on certain mitigating evidence is based on a 'strategic choice,' courts have always found no ineffective performance. *Moore v. Maggio*, 740 F.2d 308 (5th Cir.1984), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985); *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir.1987), *aff'd*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). No two lawyers would try a case exactly the same way.
>
> "We cannot say that counsel's performance is deficient because he failed to call more witnesses at the sentencing phase. 'The decision not to call a particular witness is usually a tactical decision not constituting ineffective assistance of counsel.' *Oliver v. State*, 435 So.2d 207, 208 (Ala.Cr.App. 1983): At the hearing on the Rule 32 petition, the appellant's mother, two of his aunts, an uncle, and several old friends offered character testimony. Most of these witnesses did not have contact with the appellant near the time of the murder. There has never been a case where additional witnesses could not have been called. The appellant presented relatives and personal friends who, upon interview, were found to testify on his behalf. We refuse to set a standard that a court may be reversed because it did not

> hear unoffered testimony from still more friends and relatives. We also refuse to say that a member of the bar is guilty of ineffectiveness for not calling every witness and friend who was willing to testify. To hold otherwise would clog an already overburdened system with repetitious testimony. The appellant has failed to satisfy either prong of the *Strickland* test."

State v. Tarver, 629 So.2d 14, 21 (Ala.Crim.App. 1993).

"With regard to McKinnon's representation of Morrison at the punishment-fixing and sentencing phases of his trial, we find that the observations of the court in *Clark v. Dugger*, 834 F.2d 1561, 1568 (11th Cir.1987), are appropriate:

> "'The failure to conduct a reasonable investigation of possible mitigating evidence may render counsel's assistance ineffective. *Lightbourne v. Dugger*, 829 F.2d 1012, 1025 (11th Cir.1987); *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987). "After a sufficient investigation, however, 'counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation.'" *Lightbourne*, 829 F.2d at 1025 (quoting *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir.1985), *cert. denied*, 483 U.S. 1026, 107 S.Ct. 3248, 97 L.Ed.2d 774 (1987) and *Stanley v. Zant*, 697 F.2d 955, 965 (11th Cir.1983), *cert. denied*, *sub nom.* [*Stanley v. Kemp*,] 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984)). In essence, "[c]ounsel has no absolute duty to present mitigating character evidence." *Id.* (quoting *Mitchell*, 762 F.2d at 889). [Counsel] conducted a reasonable investigation to determine the availability of

> appropriate mitigating evidence and simply made a tactical decision to not present some of the available mitigating evidence. In this circuit, [counsel's] decision is "accorded a strong presumption of correctness which is 'virtually unchallengeable.'" *Id.* (quoting *Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir.1987) and *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)). Given the alternatives . . . faced, [counsel's] handling of the penalty phase was not unreasonable. *See Stanley*, 697 F.2d at 958-70. We therefore conclude that there has been no showing of ineffective assistance nor prejudice to defendant in the way trial counsel prepared and tried [this] case.'

Morrison v. State, 551 So.2d 435, 445 (Ala.Crim.App. 1989) (alterations in original).

"We find that the holding of *Fleming v. Kemp*, 748 F.2d 1435, 1452 (11th Cir.1984), *cert. denied,* 475 U.S. 1058, 106 S.Ct. 1286, 89 L.Ed.2d 593 (1986), is applicable here:

> "'In summary, we are not persuaded by petitioner's argument that . . . [defense counsel] rendered him ineffective assistance of counsel. Petitioner's examples of professional dereliction dissolve away under close scrutiny, leaving at best a handful of colorable claims. A defense attorney is not ineffective solely because his client is sentenced to death. "Intrusive post-trial inquiry into attorney performance," such as that which has been required in this case, may "dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between

> attorney and client." *Strickland v. Washington*, [466] U.S. at [690], 104 S.Ct. at 2066. Counsel's performance, here, ensured a fundamentally "fair trial" which "produced a just result." *Id.* at [686], 104 S.Ct. at 2064. There is no reason to set aside petitioner's conviction or his penalty on account of the representation he received.'"

Bell v. State, 518 So .2d 840, 847 (Ala.Crim.App. 1987).

Finally, the appellant bears a heavy burden of proof when he claims that his counsel rendered ineffective assistance.

> "Further, we cannot say that the appellant suffered any prejudice based on counsel's performance because he failed to demonstrate any evidence of mitigation. Prejudice cannot merely be alleged; it must be affirmatively proved. *Duren v. State*, 590 So.2d 360 (Ala.Crim. App.1990). Thus, the appellant has not shown that there is a reasonable probability that the outcome of his trial would have been different, but for trial counsel's performance. *Baldwin* [*v. State*, 539 So.2d 1103 (Ala.Crim.App.1988)], *Thompson v. State*, 581 So.2d 1216 (Ala.Crim. App.1991), *cert. denied*, 502 U.S. 1030. 112 S.Ct. 868, 116 L.Ed. 2d 774 (1992)."

Brooks v. State, 695 So.2d 176, 182 (Ala.Crim.App. 1996), *aff'd*, 695 So.2d 184 (Ala. 1997).

When it addressed this contention, the circuit court noted, in part:

> "Many of the [claims] asserted by Wood allege that more should have been done. When a claim is raised that trial counsel should have done

something more, the Court first looks at what counsel did in fact. *Chandler*, 218 F.3d at 1319. In this case, counsel employed the services of an investigator. In addition, Attorney Trotter met with Wood's family in preparing for the penalty phase. At the penalty phase, trial counsel presented testimony from Wood's father and two of his siblings. Trial counsel also presented evidence suggesting that Wood suffered from an emotional disturbance. Further, the record shows that trial counsel used the services of a private investigator, who prepared reports for use in preparing Wood's defense. The record also shows that trial counsel investigated a potential mental health defense, but decided against presenting it. At the meetings between Attorney Trotter and Wood's family, Trotter testified that he attempted to gather information about Wood's upbringing, background, childhood, what it had been like growing up in Wood's home, Wood's characteristics, and information that could humanize Wood in the jury's eyes.

"Counsel also attempted to get information from Wood's schools. In that regard, counsel contacted individuals at Luverne High School. The testimony at the evidentiary hearing also shows that trial counsel sought information from the Alabama Department of Pardons and Paroles, the Alabama Department of Corrections, and the Department of Human Resources. In addition, trial counsel sought guidance from the Capital Resource Center and the Southern Poverty Law Center.

"Based on the evidence in the record, the Court finds that Wood failed to establish that what

> trial counsel did in preparation and investigation for the penalty phase was unreasonable. A.R. Cr. P., 32.3. Thus, Wood's claims that more should have been done are not well-taken. The Court finds that Wood failed to establish deficient performance of his attorneys during their preparation of the penalty phase."

(S.C.R.56-57.) We agree with the circuit court's findings, conclude that they are supported by the record, and adopt them as part of this opinion. Although the appellant has made allegations regarding the performance of his attorneys, he has not established that their performance was deficient and that he was prejudiced by their deficient performance. Therefore, because he has not satisfied his burden of pleading and proof pursuant to Rules 32.3 and 32.6(b), Ala. R.Crim. P., and *Strickland* as to these claims, he is not entitled to relief, in this regard.

B.

Second, the appellant contends that his attorneys rendered ineffective assistance because they:

> 1) did not adequately prepare for the suppression hearing;
>
> 2) did not properly prepare for and act properly during the voir dire proceedings;
>
> 3) did not properly advise the appellant regarding jury sequestration;
>
> 4) did not adequately argue their *Batson* motion;
>
> 5) did not adequately investigate and challenge the State's investigation and presentation of the case;

6) did not present any defense witnesses during the guilt phase of the trial;

7) did not adequately challenge the evidence the State relied on to establish the burglary and the murder;

8) did not procure necessary expert assistance;

9) did not adequately develop impeachment evidence against the State's leading witness;

10) did not adequately challenge the testimony of the State's witnesses regarding the intentional murder;

11) did not adequately investigate and present evidence regarding his mental state and intoxication at the time of the offense;

12) did not object to prosecutorial misconduct;

13) did not request a jury instruction on intoxication; and

14) did not ask the judge who presided over his trial to recuse himself.

The appellant has made allegations as to these contentions, but he has not adequately established that his attorneys' performance was deficient and that that deficient performance prejudiced him. Therefore, he has not satisfied his burden of pleading and proof under Rules 32.3 and 32.6(b), Ala. R. Crim. P., and Strickland. Accordingly, he is not entitled to relief on these claims.

C.

Third, the appellant contends that his attorneys rendered ineffective assistance, in part, due to allegedly inadequate compensation. To the extent he challenges

the statutory limit on attorney fees in capital cases, his argument is procedurally barred because he could have raised it at trial and on appeal, but did not. *See* Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P. To the extent he raises an ineffective-assistance-of-counsel claim, his argument is without merit. As set forth above, the circuit court found that the appellant's attorneys rendered effective assistance at trial and on direct appeal. The records of the appellant's trial and the Rule 32 proceedings support those findings. Therefore, the appellant has not satisfied his burden of proof under *Strickland* or Rule 32.3 and 32.6(b), Ala. R.Crim. P., and he is not entitled to relief on this claim.

IV.

Additionally, the appellant argues that he is entitled to post-conviction relief because:

> 1) the judge who presided over his trial should have recused himself;
>
> 2) he was arrested without a warrant or probable cause;
>
> 3) any statements he made should have been suppressed;
>
> 4) the prosecutor engaged in misconduct during the trial and sentencing proceedings;
>
> 5) the capital murder statute pursuant to which he was convicted is unconstitutional;
>
> 6) the State did not comply with its discovery obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963);
>
> 7) the State did not give adequate notice of the aggravating circumstances upon which it intended to rely;

8) the trial court improperly refused to remove prospective jurors for cause;

9) his death sentence was imposed in a racially discriminatory manner;

10) his human rights were violated in contravention of the International Convention of Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination; and

11) his rights were violated because a juror did not answer a question truthfully during the voir dire proceedings.

Claims 1-10 are nonjurisdictional claims that are precluded pursuant to the provisions of Rule 32.2(a), Ala. R. Crim. P. Also, the appellant has made only bare allegations as to Claim 11 and has not established that he could not have raised that claim at trial and on appeal. *See* Rules 32.1(e), 32.3, and 32.6(b), Ala. R. Crim. P. Therefore, he is not entitled to relief on any of these claims.

V.

Finally, the appellant argues that the circuit court improperly adopted verbatim the State's proposed order.

> "While the practice of adopting the State's proposed findings of fact and conclusions of law is subject to criticism, the general rule is that even when the court adopts proposed findings and conclusions verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer, N.C.* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Hubbard v. State*, 584 So.2d 895 (Ala.

Cr.App.1991); *Weeks v. State*, 568 So.2d 864 (Ala. Cr.App.1989), *cert. denied*, 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990); *Morrison v. State*, 551 So.2d 435 (Ala.CrApp.1989), *cert. denied*, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed. 2d 301 (1990).'

"*Wright v. State*, 593 So.2d 111, 117-18 (Ala.Cr.App. 1991), *cert. denied*, [506] U.S. [844]., 113 S.Ct. 132, 121 L.Ed.2d 86 (1992)."

Holladay v. State, 629 So.2d 673, 687-88 (Ala.Crim. App.1992). The record does not indicate that the circuit court's findings are clearly erroneous. In fact, it supports those findings. Therefore, the appellant's argument is without merit.

For the above-stated reasons, we affirm the circuit court's judgment.

AFFIRMED

McMILLAN, P.J., and SHAW and WISE, JJ., concur; COBB, J., concurs in part in the rationale and concurs in the result, with opinion.

COBB, Judge, concurring in part in the rationale and concurring in the result.

I concur with the majority as to its resolution of the issues in Parts II-V of the opinion. I agree with the result reached by the majority in Part I. I write specially to express my concern regarding the majority's adoption of the trial court's order on return to remand.

In *Wood v. State*, [Ms. CR-01-0700, April 25, 2003] —So.2d—(Ala.Crim.App.2003), we remanded the cause for the trial court to conduct an evidentiary hearing to determine whether Wood is mentally retarded and, if so, to determine whether his trial

attorneys rendered ineffective assistance by failing to develop and present evidence of his retardation. The trial court conducted the hearing and filed with this Court a comprehensive, superbly written order on return to remand. The trial court thoroughly discussed the evidence presented at the hearing and correctly applied the relevant law to those facts.

I do not disagree with the majority's adoption of the trial court's order on return to remand. However, I believe that, in a case involving review of post-conviction proceedings in a capital murder case in which the death penalty was imposed, discussion and analysis of the trial court's findings of fact and conclusions of law are necessary. Without any specific discussion or analysis of the findings in the trial court's order on return to remand, indeed, without quotation to any of the relevant portions it says the Court adopts, the decision of this Court as to this issue has virtually no precedential value and review of this issue by higher courts will be made unnecessarily difficult.

I would prefer a more comprehensive discussion of the trial court's findings and conclusions in Part I. Therefore, I concur in the result as to Part I.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Case No. 2:04cv509 F

HOLLY WOOD
Petitioner,

vs.

DONAL CAMPBELL, Commissioner, Alabama Department of Corrections and TROY KING, Attorney General for the State of Alabama
Respondents.

May 26, 2005

PETITION FOR WRIT OF HABEAS CORPUS BY PRISONER IN STATE CUSTODY UNDER DEATH SENTENCE

Petitioner Holly Wood, now incarcerated at Holman Correctional Facility in Atmore, Alabama, respectfully petitions this Court for a writ of habeas corpus under 28 U.S.C. § 2254 to grant him relief from his unconstitutionally obtained conviction and death sentence.

I. INTRODUCTION

1. This is a death penalty case involving a mentally retarded defendant who, during the critical penalty phase of his trial, was represented by a court-appointed lawyer who had only been admitted to the

bar for approximately five months and who had never worked on a capital murder

* * * *

28. On April 25, 2003, the Alabama Court of Criminal Appeals remanded the case to the circuit court "with instructions that the court conduct an evidentiary hearing on and make specific, written findings of fact as to [Wood's] contentions that he is mentally retarded and that his trial attorneys rendered ineffective assistance because they did not develop and present evidence that he is mentally retarded." *Wood v. State*, 2003 WL 1949784 (Ala. Crim. App. April 25, 2003).

29. On August 4, 2003, the circuit court held an evidentiary hearing. On September 24, 2003, the circuit court, again adopting with only minor changes the Alabama Attorney General's proposed findings, issued its written findings of fact and conclusions of law, rejecting Mr. Wood's claims.

30. On January 6, 2004, the Alabama Court of Criminal Appeals affirmed the circuit court's findings, denying all of Mr. Wood's claims for relief. *Wood v. State*, 2004 WL 26737 (Ala. Crim. App. Jan. 6, 2004). On February 20, 2004, the Court of Criminal Appeals overruled Mr. Wood's application for rehearing.

31. On May 21, 2004, the Alabama Supreme Court denied Mr. Wood's petition for writ of certiorari.

32. This petition represents Mr. Wood's first and only application for habeas corpus relief.

III. GROUNDS SUPPORTING PETITION FOR RELIEF

A. TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF MR. WOOD'S TRIAL

1. Trial Counsel Failed To Conduct A Reasonable Investigation Into Mr. Wood's Background To Uncover Mitigation Evidence For the Penalty Phase of Mr. Wood's Trial

33. Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). This includes a duty to "'conduct a thorough investigation of the defendant's background'" prior to the penalty phase of a capital proceeding," and the failure to do so precludes a finding that the absence of a penalty phase defense was strategic. *Wiggins v. Smith*, 123 S. Ct. 2527, 2535 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) ("At the heart of effective representation is the independent duty to investigate and prepare [the client's case]"). As the U.S. Supreme Court has explained, in assessing capital counsel's effectiveness, "we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [defendant's] background was *itself reasonable*." *Wiggins*, 123 S. Ct. at 2536 (emphasis in original).

34. A full investigation of the history of the client by trial counsel is absolutely essential preparation for the penalty phase of a capital proceeding. The trial court and jury are constitutionally required to consider

as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This includes any evidence about the defendant's history and life that may be considered by the jury or judge as a mitigating factor. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

35. In order to adequately prepare for the penalty phase of Mr. Wood's capital trial, counsel should have obtained complete and accurate information relevant to Mr. Wood's medical history, mental retardation, educational history, employment and training history, family and social history, his correctional history, and any religious and cultural influences. American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 11.4.1(A)(2)(c) (adopted by the ABA House of Delegates Feb. 7, 1989); *see Wiggins*, 123 S. Ct. at 2536-37 ("we long have referred" to the "standards for capital defense work articulated by the American Bar Association" as "'guides to determining what is reasonable").

36. Despite these well-established norms, Mr. Wood's trial counsel abandoned their investigation of Mr. Wood's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.

37. Trial counsel did not personally interview any of the family members prior to trial. The investigator hired by trial counsel only interviewed Mr. Wood's father and two of Mr. Wood's sisters and did not question them about possible mitigation evidence. Trial counsel did not talk to the family members

about testifying at the penalty phase until after the trial had started.

38. Although trial counsel had a competency evaluation prepared by Dr. Kirkland, which stated that Mr. Wood was functioning in the borderline range of intelligence and was reading on only a third grade level, they did nothing to further investigate the obvious mental retardation issues raised by this report. They did not speak with his special education teachers, friends or family about these issues.

39. In this case, effective preparation and investigation by trial counsel would have revealed a wealth of mitigating evidence, which should have been presented at the penalty phase. These failures, individually and collectively, rendered trial counsel's performance ineffective during the critical penalty phase of Mr. Wood's trial and violated Mr. Wood's Sixth Amendment right to counsel. *Strickland v. Washington*, 466 U.S. 668 (1984).

a. Trial Counsel Failed to Investigate and Present Evidence of Mr. Wood's Poverty

40. Trial counsel were ineffective in failing to investigate and present evidence regarding Mr. Wood's difficult and impoverished childhood. Courts have long recognized the failure to investigate and present evidence of poverty as the type of failure that prejudices the defendant and renders counsel ineffective. *See Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987) (finding that failure to develop available mitigation including evidence of poverty and poor living conditions "clearly met the prejudice requirement"); *Cunningham v. Zant*, 928 F.2d 1006, 1017 (11th Cir. 1991) (holding "poverty stricken

background" is the type of mitigation trial counsel should have prepared and presented).

41. During the penalty phase of Mr. Wood's trial, counsel only asked limited questions of Mr. Wood's father, two of his sisters and a secretary from the Board of Pardons and Paroles. The limited testimony that was presented from these witnesses involved a brief discussion of the family background, testimony regarding whether Mr. Wood was a good brother and son, and testimony that these family members would not want to see Mr. Wood executed. The secretary from the Board of Pardons and Parole testified that the arrest report indicated that Mr. Wood had been drinking and that in a letter denying Mr. Wood parole on an unrelated charge, the Board noted that Mr. Wood needed reality therapy. Trial counsel's entire penalty phase presentation covered a total of only 34 pages.

42. Had counsel conducted a reasonable investigation, or adequately prepared the three witnesses who testified at the penalty phase, Mr. Wood's sisters and teachers would have testified about the extreme poverty in which Mr. Wood and his siblings grew up. For example, Mr. Wood's oldest sister would have testified that they had to grow food in their garden in order to have food to eat. Much of the time they did not have food and had to go without. She would have also testified that while she was raising her siblings, the house they lived in burned down and that when they finally moved into another house, they had to rely on donations from the community to furnish the house.

43. The family's poverty also prevented them from access to medical care. Mr. Wood's oldest sister would have told the jury that Mr. Wood wet the bed

until he was fourteen or fifteen and that this problem was not taken care of because they didn't have access to medical care.

44. Trial counsel's failure to adequately investigate and prepare witnesses to present the family's poverty prejudiced Mr. Wood by denying the jury information that would have presented Mr. Wood in a sympathetic light. The jury was denied the opportunity to consider as mitigation the effects of the years of deprivation on Mr. Wood's personal development.

45. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

b. Trial Counsel Failed to Investigate and Present Evidence of Mr. Wood's Early Exposure to Violence and His Physically Abusive Childhood

46. Counsel was ineffective for failing to contact Mr. Wood's relatives, friends, peers and educators who would have provided a wealth of mitigating evidence regarding the physical violence and abuse that Mr. Wood was exposed to throughout his childhood and into adulthood. History of child abuse and exposure to violence is classic mitigation evidence. Justice Rehnquist explained the obvious relevance of a history of abuse for understanding adult behavior: "A stable, loving home life is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745, 789 (1982). Courts have found trial counsel inef-

fective at the penalty phase for failure to develop mitigation evidence, including evidence of abuse. *See. e.g., Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1985).

47. Available witnesses would have testified that virtually all of Mr. Wood's caretakers, guardians and role-models were abusive. If asked, Mr. Wood's siblings would have testified that Mr. Wood was exposed to domestic violence during his formative years and throughout his life.

48. Available witnesses, including Mr. Wood's siblings, would have testified that Mr. Wood was not only a witness to violence between adults in his life, but the subject of extreme violence and brutality meted out by his care-givers. Friends, relatives, and teachers were also available to testify to the physical abuse that Mr. Wood suffered as a child.

49. For example, Mr. Wood's most abusive caretaker was Nell Zena, his oldest half sister, who cared for him from age 11 to 14. Mr. Wood's younger sister would have testified that Mr. Wood received the majority of Nell Zena's abuse. Nell Zena beat Mr. Wood with extension cords regularly. She would have described beatings so brutal that when Nell Zena was finished, the extension cord was literally dripping with Mr. Wood's blood.

50. Had counsel investigated Mr. Wood's early childhood and social background, they would have been able to introduce expert testimony to give the jury a clinical perspective of the long-term effects of child abuse and domestic violence. An expert would have presented the specific behavioral consequences of child abuse and explained that an abused child misses important socialization experiences that may interfere with adolescent and adult relationships.

51. This information would have been relevant to the jury's assessment of the appropriate punishment. Mr. Wood's devastating history of prolonged and severe abuse could have persuaded the jury to feel sympathetic and could have provided an explanation to the jury of why Mr. Wood may have acted as he did.

52. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

c. Trial Counsel Failed to Investigate and Present Evidence of Mr. Wood's Early Exposure to Alcohol and the Possibility That He Suffered from Fetal Alcohol Syndrome at Birth

53. Trial counsel based its penalty phase mitigation argument in large part on the assertion that Mr. Wood was drinking on the day of the crime. Despite counsel's reliance on this fact, trial counsel failed to investigate and present evidence of Mr. Wood's early exposure to alcohol, his family history of alcohol abuse, and his own personal history of alcohol abuse.

54. Had counsel conducted an adequate investigation for mitigation evidence, they would have discovered the culture of intoxication that pervaded Mr. Wood's background. Mr. Wood's siblings would have testified that he was exposed to alcohol from infancy through adulthood.

55. Mr. Wood's sister would have testified that their mother sold moonshine from their home to make money and that Mr. Wood was likely exposed to alcohol in the womb. Trial counsel's failure to adequately investigate Mr. Wood's family history

with alcohol prevented counsel from learning of the probability that Mr. Wood suffered from fetal alcohol syndrome.

56. Counsel was also ineffective for failing to present expert testimony regarding the impact of Mr. Wood's sustained exposure to alcohol. An expert would have interpreted the long-term behavioral consequence of early and sustained exposure to alcohol and would have also given the jury a clinical understanding of the mitigating impact of Mr. Wood's sustained exposure to alcohol.

57. Counsel's failure to present this evidence of alcohol abuse and possible fetal alcohol syndrome was clearly prejudicial. *See. e.g., Eutzy v. Dugger*, 746 Supp. 1492 (N.D. Fla. 1989) (holding counsel ineffective for failing to prepare and present evidence where available mitigation would have shown that defendant began drinking at age 12 and had a history of alcohol abuse.).

58. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

d. Trial Counsel Failed to Investigate and Present Evidence of Mr. Wood's Childhood Traumatic Experiences With Death

59. Trial counsel also failed to investigate and adequately present evidence regarding the psychological effects of Mr. Wood's childhood traumatic experiences with death, including the loss of his mother and younger brother at an early age. During the penalty phase, trial counsel elicited only minimal details about these significant traumatic experiences.

60. Had trial counsel conducted an adequate investigation into Mr. Wood's background, they would have learned about the extreme anxiety Mr. Wood felt after his brother's death. Mr. Wood was in a car accident with his brother and witnessed his brother's death. His sister would have testified about how close Mr. Wood was with his younger brother and how Mr. Wood was never the same after his brother's death.

61. A mitigation expert could have explained the kind of psychological impact this type of trauma and remorse would have had on him at this young age.

62. In failing to present evidence of these traumatic experiences with death, trial counsel prejudiced Mr. Wood. The jury was denied testimony that would have underscored the extraordinarily difficult circumstances of Mr. Wood's childhood.

63. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of clearly established United States Supreme Court precedent.

e. Trial Counsel Was Ineffective for Failing to Investigate and Present Evidence of Mr. Wood's Mental Retardation and Mental Disability

64. Had trial counsel conducted an adequate investigation, they would have discovered significant evidence suggesting that Mr. Wood was mentally retarded and suffered from mental disability. The evidence was readily available to counsel, yet they failed to discover and present this powerful mitigation evidence.

65. For example, prior to commencement of his trial, Mr. Wood was examined to determine his

competency to stand trial by a state-retained psychologist, Dr. Karl Kirkland. In his report, Dr. Kirkland diagnosed Mr. Wood as functioning in the borderline range of intelligence. This finding should have alerted counsel to the likelihood of mental retardation.

66. Trial counsel also failed to interview any of Mr. Wood's teachers in order to explore this highly relevant mitigation evidence, and failed to interview Mr. Wood's family members who would have testified about Mr. Wood's mental retardation.

67. Two of Mr. Wood's high school special education teachers were available at the time of trial to explain that Mr. Wood was placed in special education because of his low IQ and poor reasoning and reading skills. His teachers could have explained that Mr. Wood was considered educable mentally retarded and was an average student within the special education classes.

68. Trial counsel also failed to investigate the history of mental disabilities in Mr. Wood's family. Had trial counsel adequately interviewed the family members, they would have learned that one of Mr. Wood's younger sisters was diagnosed as mentally retarded, and with attention deficit and multiple sleeping disorders. Counsel would have also learned that other sisters received treatment for depression and other mental illnesses. The extensive presence of mental retardation and mental disability in Mr. Wood's family should have alerted trial counsel to the issue of Mr. Wood's own mental retardation and mental disability, critical areas neglected during the penalty phase of Mr. Wood's trial.

69. Trial counsel's failure to investigate and present evidence of Mr. Wood's mental retardation and mental disability during the penalty phase of his trial prejudiced Mr. Wood. Trial counsel did not retain an independent mental health expert who could have examined Mr. Wood and presented Mr. Wood's mental retardation and mental disability to the jury in the context of statutory and non-statutory mitigators. Further, trial counsel did not present any testimony to the jury about Mr. Wood's mental retardation and mental disability, thus denying the jury critical evidence for sentencing.

70. Evidence of mental retardation and mental disability are areas that courts have recognized as critical mitigation. Courts regularly award new penalty phase hearings based in part on trial counsel's failure to present evidence of mental retardation and learning disabilities. *See, e.g., Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995) (noting borderline mental retardation as example of kind of undeveloped mitigation requiring a new penalty trial); *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987) (citing mental retardation as a factor); *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995) (counsel's failure to request medical records, interview important family members, neighbor, and social worker resulted in prejudice because counsel therefore could not develop mental health mitigation).

71. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

f. Trial Counsel Failed to Investigate and Present Evidence of Mr. Wood's Educational Background and School Experience

72. Rather than providing Mr. Wood with a stable learning environment, school was another source of rejection and humiliation for him. Trial counsel made no effort to contact any of Mr. Wood's former teachers or classmates, and thus never learned of the significant mitigating evidence stemming from Mr. Wood's troubled educational experience. Several of Mr. Wood's former teachers would have willingly provided trial counsel with critical mitigation information, including Mrs. Penn, Mrs. Hilda Maddox, Mr. Doug Brown, and Mrs. Alfredo Griffin.

73. Trial counsel also failed to interview Mr. Wood's siblings Johnnie Pearle Wood, Mae Ola Wood, Willie Pearl Wood, and Lillie Jean Wood about Mr. Wood's school experiences.

74. Mr. Wood was in special education for the entire time he was a student at Luverne High. Mr. Wood's sisters Sandra and Mae Ola were also in special education. Mae Ola would have testified about the intense and constant feeling of shame that haunted the special education students, or the "moles." As Mr. Wood's former teachers explained, the special education students were referred to as "moles" who lived in the "mole hole" because the special education classrooms were substandard and located in the basement. Teachers from Mr. Wood's high school would have recounted that students called someone "Holly B" as a derogatory term to insult them.

75. Trial counsel failed to adequately investigate Mr. Wood's educational experiences and thus remained ignorant of this critical mitigation evidence. By failing to investigate and develop the readily available and substantial evidence of Mr. Wood's traumatic school experiences, trial counsel deprived the jury of information critical to the "individualized sentencing" the Eighth Amendment requires.

76. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

g. Trial Counsel Failed to Investigate and Present Mr. Wood's Relationship With His Son as a Mitigating Factor

77. Counsel was ineffective for failing to investigate available mitigation that would have shown that Mr. Wood was dedicated to his son. Mr. Wood's friends and relatives were available to testify about Mr. Wood's devotion to his young son, Holly Jr. Had counsel conducted an adequate investigation they would have learned that Mr. Wood spent a lot of time with his son and that he was "real, real close to him."

78. Trial counsel failed to investigate adequately Mr. Wood's relationship with his son and thus remained ignorant of this critical mitigation evidence. By failing to investigate and develop the readily available and substantial evidence of Mr. Wood's close relationship with his son, trial counsel was ineffective.

79. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

h. Trial Counsel's Deficient Performance Resulted in Substantial Prejudice to Mr. Wood

80. Appropriate investigation and presentation of mitigating evidence is key to the type of individualized sentencing determinations that are constitutionally required in capital cases. *See Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986). In Mr. Wood's case, trial counsel "presented no more than a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of the character and record of a convicted defendant before the imposition upon him of a sentence of death.'" *Collier v. Turpin*, 177 F.2d 1184, 1202, (11th Cir. 1999). As discussed above, a wealth of mitigating evidence, including evidence of abuse, poverty and neglect, mental retardation and mental disability, emotional stress, alcohol abuse, and a positive father son relationship, should have been investigated and presented by trial counsel at the penalty phase.

81. Counsel's failure to develop such critical evidence denied Mr. Wood the effective assistance of counsel and prejudiced Mr. Wood. "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 123 S.Ct. at 2543; *see, e.g., Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (finding counsel ineffective for failure to conduct investigation into petitioner's background, which would have revealed childhood neglect, physical abuse, substance abuse, low IQ, and emotional distress at the time of the homicide). This failure was especially prejudicial to Mr. Wood considering the

fact that the jury's vote on death was 10-2—the bare minimum wider Alabama law.

82. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

2. Trial Counsel Failed to Introduce Expert Testimony at the Penalty Phase

83. Trial counsel did not call a single expert witness at the penalty phase of Mr. Wood's trial, and thus failed to present critical evidence of Mr. Wood's mental retardation, as well as an analysis of the impact that Mr. Wood's exposure to alcohol, childhood trauma and abuse, and poverty had on his development. Despite the clear signs that Mr. Wood needed expert psychological assistance, trial counsel failed to retain an independent psychologist to examine Mr. Wood and testify at the penalty phase.

84. In *Ake v. Oklahoma*, the Supreme Court held that the guarantee of fundamental fairness of the Due Process clause "at a minimum, assures the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense." 470 U.S. 68, 83 (1985).

85. Significant evidence was available at the time of Mr. Wood's trial that suggested that he is mentally retarded and suffers from mental disability. As previously discussed, former teachers of Mr. Wood would have told trial counsel that Mr. Wood was in special education and had a low IQ. Mr. Wood's poor academic performance and grades are other indications of mental retardation. Mr. Wood's visible eye deformation is an example of a facial abnormality symptomatic of fetal alcohol syndrome and mental disorder.

86. Trial counsel also had the results of a psychological examination conducted to determine if Mr. Wood was competent to stand trial that indicated that Mr. Wood had trouble with anger control, antisocial behavior, and that Mr. Wood functions in the "borderline intelligence" range.

87. Although each piece of evidence alone likely would have warranted a complete psychological evaluation, Mr. Wood's special education placement, his poor academic performance, facial abnormality, family history of mental illness and mental retardation, together with the psychological report by Dr. Kirkland referencing Mr. Wood as functioning in the borderline intelligence range, clearly required expert assistance.

88. Mr. Wood should have been evaluated by an independent psychologist with experience in the area of mental retardation to determine his degree of mental retardation and the presence of mental disability. Based on the information from Mr. Wood's older sister that their mother drank alcohol throughout her pregnancies, trial counsel should have also requested an examination by a neurologist to determine if Mr. Wood suffered from fetal alcohol syndrome.

89. Trial counsel's failure to present testimony from a mental health expert resulted in clear prejudice to Mr. Wood. A mental health expert would have been able to describe Mr. Wood's mental retardation as well as the commutative effects of intelligence disabilities and mental illnesses with social histories such as Mr. Wood's. This type of evidence of limitations and difficulties, rooted at birth and in early childhood, is particularly likely to gain the sympathies of jurors. *See. e.g., Glenn v. Tate*, 71 F.3d 1204

(6th Cir. 1995) (explaining that jurors are more likely to be persuaded by evidence such as mental retardation), *cert. denied* 519 U.S. 910 (1996).

90. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of clearly established United States Supreme Court precedent.

3. Trial Counsel Failed to Adequately Investigate the State's Case and Made Prejudicial Errors in Challenging the Aggravating Circumstances Relied Upon by the State

91. Trial counsel failed to adequately investigate the State's case and was therefore unprepared to challenge the aggravating circumstances relied upon by the State at the penalty phase. For example, trial counsel allowed a prejudicial letter from the district attorney's office to be published to the jury without defense objection. The letter stated the district attorney's opposition to Mr. Wood's release on parole in connection with a prior conviction. Trial counsel did not read the letter before waiving its objection. The failure to exclude this clearly prejudicial letter thus cannot be construed as a strategic decision since counsel did not know its contents.

92. The letter clearly should have been excluded because it was irrelevant to any fact at issue. *See Gamble, McElroy's Alabama Evidence* § 21.01 (4th Ed. 1991) (explaining that under Alabama law evidence is admissible only if it is relevant and probative of a fact at issue in a case). The letter was not relevant to prove that Mr. Wood was convicted of a prior conviction, nor that Mr. Wood was on parole. The only significance of the letter was that it

conveyed the prosecutor's opinion that Mr. Wood was a violent criminal who should not be released because of future dangerousness. Alabama law does not permit comments on future dangerousness. Ala Code § 13A-5-49.

93. By failing to object to this damaging evidence, Mr. Wood's trial counsel failed their duty to provide Mr. Wood with the effective assistance of counsel at the penalty phase. As a result of counsel's failure, the jurors considered an impermissible aggravator, future dangerousness, in their deliberation about sentencing. The jury members may have concluded that the likelihood of Mr. Wood committing a future crime required a death sentence. Mr. Wood was prejudiced by trail counsel's failure to exclude this evidence.

94. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

4. Trial Counsel Failed to Prevent or Otherwise Object to Egregious Instances of Prosecutorial Misconduct

95. Trial counsel failed to object to egregious prosecutorial misconduct during the penalty phase. For example, trial counsel did not object to the prosecution's violation of the strict Alabama statutory prohibition on commenting on future dangerousness. Trial counsel did not object to the prosecution's use of a fable during closing argument to argue that Mr. Wood posed a future danger. As a result of counsel's failure to object, the jury was encouraged to consider future dangerousness in violation of the Alabama statutory prohibition and Mr. Wood's rights to due

process, a fair trial and a reliable and individualized sentence. Mr. Wood was prejudiced by trial counsel's failure to object to clearly impermissible argument.

96. Trial counsel also failed to object to the prosecution's misstatement of the law on mitigation. The prosecution encouraged the jury to disregard mitigating factors in its closing of the penalty phase, suggesting that the mitigating factors were nothing more than after-the-fact excuses. Trial counsel's failure to object allowed the jury to enter deliberations with the understanding that Mr. Wood was fabricating excuses for his crime. This prejudiced Mr. Wood by making it less likely that the jury would vote for life.

97. The State court adjudication of these claims resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

5. Trial Counsel Failed to Request A Jury Instruction On The Issue Of Mental Retardation

98. Prior to trial, counsel was aware that Mr. Wood had symptoms consistent with mental retardation. Indeed, the State's own psychiatrist, Dr. Kirkland in his competency examination of Mr. Wood, stated that Mr. Wood functions "at most, in the borderline range of intellectual functioning." In addition, Mr. Wood's history of learning disability was well documented in medical and school records and was well known among his teachers and family who were willing to testify at trial.

99. The American Association on Mental Retardation explains that individuals with mental retardation suffer lower cognitive impairment, and difficulty with moral reasoning, impulse control, and under-

standing of causal relationships. This set of effects reduces the level of culpability of individuals with mental retardation to a level disproportionate to capital punishment.

100. In *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989) ("*Penry I*"), the United States Supreme Court vacated a death sentence when the jury "was unable to give effect to the mitigating evidence of Penny's mental retardation."

101. In *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), the Supreme Court again ruled that a jury instruction was inadequate when it again failed to enable the jury to give effect to the issue of mental retardation. In finding the instruction in *Penry II* inadequate, the Supreme Court acknowledged the importance of raising mental retardation as a mitigating factor and providing a jury instruction on such an issue.

102. Although Judge Barr, unlike the trial judge in *Penry I* and *II*, instructed the jury that it could consider "the defendant's mental or emotional disturbance" as a mitigating factor, this instruction was insufficient and rendered meaningless by the lack of evidence at the trial bearing on Mr. Wood's "mental or emotional disturbance." Therefore, the jury was "unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." *Penry I*, 492 U.S. at 322 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)).

103. Trial counsel's failure to request a jury instruction on mental retardation resulted in prejudice to Mr. Wood. Had the jury been instructed on the issue of mental retardation they could have given "effect and consideration" to Mr. Wood's mental

retardation and the jury's 10-2 vote for the imposition of the death penalty would Rely have been different.

104. The State court adjudication of this claim resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established United States Supreme Court precedent.

* * * *

(ORDER LIST: 556 U.S.)

MONDAY, MAY 18, 2009

CERTIORARI—SUMMARY DISPOSITIONS

08-816 RENASANT BANK v. KIMBERLIN, JAMES

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Arthur Andersen LLP v. Carlisle*, 556 U.S. ___ (2009).

08-5316 MENDOZA-GONZALEZ, NICASIO v. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Flores-Figueroa v. United States*, 556 U.S. ___ (2009).

ORDERS IN PENDING CASES

08M78 ABELE, MEL v. BROOKSVILLE, FL

The motion for leave to proceed as a veteran is denied.

08M79 KOESTER, RICHARD v. LANFRANCHI, MICHAEL, ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

105, ORIG. KANSAS v. COLORADO

The motion of the Special Master to be discharged is granted, and Arthur Littleworth, of Riverside, California, the Special Master in this case, is hereby discharged with the thanks of the Court.

08-974 LEWIS, ARTHUR L., ET AL. v. CHICAGO, IL

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

08-8463 IN RE DANNY R. DUNLAP

08-9123 PERKINS, VICTOR B. v UNITED STATES

The motions of petitioners for reconsideration of orders denying leave to proceed *in forma pauperis* are denied.

CERTIORARI GRANTED

08-861 FREE ENTERPRISE FUND, ET AL. v. PUBLIC CO. OVERSIGHT BD., ET AL.

08-876 BLACK, CONRAD M., ET AL. v. UNITED STATES

The petitions for writs of certiorari are granted.

08-9156 WOOD, HOLLY v. ALLEN, COMM'R, AL DOC, ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.

08-992 BEARD, SEC., PA DOC, ET AL. v KINDLER, JOSEPH J.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. Justice Alito took no part in the consideration or decision of this motion and this petition.

CERTIORARI DENIED

08-537 SUNRISE VALLEY, LLC, ET AL. v. SALAZAR, SEC. OF INTERIOR

08-622 UNITED STATES v. VILLANUEVA-SOTELO, GUSTAVO

08-771 MORGORICHEV, SERGEI v. HOLDER, ATT'Y GEN.

08-871 CANADIAN PACIFIC RAILWAY COMPANY v. LUNDEEN, TOM, ET AL.

08-872 DEDMAN, FRANCES D. v. UNITED STATES

PETITIONER'S BRIEF

135

CAPITAL CASE
No. 08-9156

Supreme Court, U.S.
FILED
AUG 3 - 2009
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IN THE

Supreme Court of the United States

HOLLY WOOD,
Petitioner,

v.

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama,
and GRANTT CULLIVER, Warden,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise?

2. Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?

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IN THE

Supreme Court of the United States

CAPITAL CASE
NO. 08-9156

HOLLY WOOD,
Petitioner,

v.

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama,
and GRANTT CULLIVER, Warden,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE PETITIONER HOLLY WOOD

OPINIONS BELOW

The Eleventh Circuit's decision, which reversed the District Court's grant of habeas corpus relief, is reported at *Wood v. Allen*, 542 F.3d 1282 (11th Cir. 2008) and is reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a. The District Court's decision is reported at *Wood v. Allen*, 465 F. Supp. 2d 1211 (M.D. Ala. 2006), and is repro-

duced at Pet. App. 99a. The decisions of the Alabama Court of Criminal Appeals and Alabama Supreme Court on direct appeal are reported at *Wood v. State*, 715 So. 2d 812 (Ala. Crim. App. 1996) and *Ex parte Wood*, 715 So. 2d 819 (Ala. 1998), *cert. denied*, 525 U.S. 1042 (1998) and reproduced in the Joint Appendix ("J.A.") at 109, 125. The decision of the Alabama Circuit Court denying Wood's state post-conviction petition is reproduced in the Respondents' Appendix to their brief in opposition to the Petition for Certiorari ("Resp. App.") at 1. The decisions of the Alabama Court of Criminal Appeals affirming the denial of Wood's state post-conviction petition are reported at *Wood v. State*, 891 So. 2d 398 (Ala. Crim. App. 2003), and are reproduced at J.A. 369, 589.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006). The Eleventh Circuit entered its judgment on September 16, 2008 (*see* Pet. App. 1a-98a), and denied Wood's timely petition for rehearing and rehearing *en banc* on November 12, 2008. *See* Pet. App. 153a. Justice Thomas granted Wood's application for a 30-day extension and, on March 12, 2009, Wood timely filed a petition for a writ of certiorari, which this Court granted on May 18, 2009. J.A. 635.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are provided in Petitioner's Petition for Writ of Certiorari at 2-3 (quoting U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1; and 28 U.S.C. §§ 2254(d), (e)(1) (2006)).

STATEMENT OF THE CASE

Holly Wood, who has significant mental deficiencies, was convicted of capital murder after a jury found that he had killed his former girlfriend, Ruby Gosha, in the house where she was staying. Primary responsibility for the critical penalty phase of Wood's trial fell on a novice attorney who had been assigned that task by his two more experienced co-counsel. This attorney had been admitted to the bar only four or five months prior to his appointment as Wood's counsel, had no experience in capital cases, and no jury trial experience.

This division of labor resulted in a brief penalty phase presentation of mitigating evidence that the Alabama Supreme Court described as "meager" and "scant." J.A. 131. Wood's entire mitigation case, including opening and closing statements, consumed only 49 pages in the transcript. It consisted of pleas for mercy from Wood's family members, testimony about his upbringing from his sister, a police report that indicated he had been drinking at the time of his arrest, and a parole board report remarking that he needed "anger induced, acting out and reality therapy." Afterwards, the jury recommended by a 10 to 2 vote that Wood be sentenced to death and the trial judge accepted that recommendation.

Counsel's investigation for mitigating evidence was as meager as the penalty phase presentation it produced, consisting of little more than interviews with Wood's family members at the courthouse, and requests for school and government agency records on which counsel failed to follow through. Counsel's strategy for the penalty phase was not informed by any meaningful investigation into Wood's mental

deficiencies even though counsel obtained a competency evaluation five months prior to the trial which stated that Wood was functioning "at most, in the borderline range of intellectual functioning," a clear signal of potentially powerful mitigating evidence.

As the novice attorney told the trial judge on the morning of the penalty phase, since obtaining that report, counsel had done no further investigation of Wood's potential mental health problems even though those problems needed further assessment. As a result, counsel's decisions concerning the penalty phase were not informed by the facts that Wood had an IQ in the 60s, which is within the range of mental retardation, or that he was classified as "educable mentally retarded" in school and placed in special education classes held in the school's basement. The failure to investigate Wood's significant mental deficiencies was the result of inattention and neglect by his attorneys, who did not communicate or work effectively together on a mitigation strategy.

I. THE TRIAL

In September 1993, Wood was arrested in Troy, Alabama, and charged with the capital murder of his former girlfriend, who was also the mother of his son. (R. Vol. 7, 94-96, 114.) On February 3, 1994, the trial court appointed Cary Dozier, an experienced Troy attorney, to represent Wood. (R. Vol. 7, 122-23.) The court also appointed Kenneth Trotter, who had been a member of the bar for only four or five months, and leased office space from Dozier. J.A. 261. At the time Trotter was appointed, he had not tried any jury cases to verdict and had no experience in capital murder cases. J.A. 262. A court-appointed third counsel withdrew and was replaced by Frank Ralph,

another experienced Troy attorney. (R. Vol. 7, 198-99.)

Trotter was understandably "very nervous about this whole case." J.A. 178. As Ralph later testified, "you could just tell by talking to Ken that he—he had no courtroom experience," that he was "troubled with the aspect of having to be in the courtroom." J.A. 179. Nevertheless, at some time prior to trial, Dozier and Ralph gave Trotter responsibility for the penalty phase of the trial. J.A. 179, 198.

Prior to trial, Dozier moved for a forensic psychological evaluation of Wood. (R. Vol. 7, 216-18, 234.) The trial court granted the motion and appointed a psychologist, Dr. Karl Kirkland, to evaluate Wood's "competency to stand trial and mental state at the time of the offense." J.A. 92. Kirkland prepared a Report, dated May 13, 1994 ("Kirkland Report"), which was provided to counsel at that time. *See* J.A. 323-33. While it recommended that the court find Wood competent to stand trial, it also reported that Wood "is functioning, at most, in the borderline range of intellectual functioning," could read only on a third-grade level, and "could not use abstraction skills much beyond the low average range of intellect." J.A. 327-28. Notwithstanding this information regarding Wood's significant mental deficiencies, during the five months that elapsed between counsel's receipt of the Kirkland Report and trial, Wood's counsel took no steps to investigate or develop mitigating evidence on this subject.

Dozier and Ralph handled the guilt or innocence phase of the trial, which commenced on October 17, 1994 (*see, e.g.*, R. Vol. 2, Tr. 191-398; R. Vol. 3, Tr. 409-12; R. Vol. 3, Tr. 426-37; R. Vol. 5, Tr. 801-02; R. Vol. 5, Tr. 878-907, 911-22), but their efforts were

unsuccessful. In late afternoon, on October 20, 1994, the jury returned a verdict finding Wood guilty of capital murder. (*See* R. Vol. 5, Tr. 954-55.) The court directed the jury and the parties to return at 8:30 the following morning for the sentencing phase of the case. (*See* R. Vol. 5, Tr. 956.) Although Trotter knew, and would advise the court the following morning, that his client's mental impairments identified by Dr. Kirkland five months earlier had not been investigated and "need[ed] further assessment" (J.A. 12), neither he nor his co-counsel sought a continuance of the sentencing phase to conduct such investigation prior to the presentation of mitigating evidence to the jury.

The following morning in chambers, Trotter advised the court that the Kirkland Report, completed in May, had found that "the defendant may have psychological problems that need further assessment." J.A. 12. Admitting that "[n]o further investigation ha[d] been done" with regard to those "problems," Trotter asked that "prior to any final sentencing by the Court we would request that there be further psychological evaluation done of the defendant." J.A. 12. When Trotter offered that the requested psychological evaluation "won't be admissible to this jury," the trial court twice indicated that the request would be considered "after this jury has been released." J.A. 12. Neither Trotter nor the court ever raised this issue again.

The State's presentation during the penalty phase focused on three aggravating circumstances to support a death sentence. However, the state conceded it could not establish, as an aggravating circumstance, that the killing was "heinous, atrocious and cruel." J.A. 9. Indeed, the trial court specifically

found that there was no evidence "that comes to the level that is required by the case law explaining and defining that aggravating circumstance." J.A. 9-10. Trotter's opening statement, apart from a short statement accepting the jury's verdict and describing the role that mitigating circumstances can play, consisted of a single sentence. *See* J.A. 21. He presented the testimony of Wood's father and two of his sisters with whom Trotter had met at the courthouse to discuss possible mitigation evidence. *See* J.A. 26-54. Their testimony focused primarily upon pleas to spare his life. *See* J.A. 41-42, 52-53. In addition, one of Wood's sisters testified about his upbringing, including that he lost his mother and brother, that he was raised by a cousin in a house with 16 people and then by his older sister, and that he quit school to work and make money. *See* J.A. 29-37. In addition, Trotter introduced a police report that indicated that Wood had been drinking at the time of his arrest and a parole board report remarking that he needed "anger induced, acting out and reality therapy." J.A. 60. The State had the burden of disproving the existence of any proffered mitigating circumstance that was in dispute (J.A. 80), but offered no rebuttal to the evidence Trotter presented. (R. Vol. 6, Tr. 1047.)

During the charge conference after the close of evidence, Trotter offered two instructions related to mental or emotional disturbance. Although the court found that "there has been no evidence presented to this jury concerning emotional disturbance" (R. Vol. 6, Tr. 1050), it agreed to give the instructions. In his closing statement, however, Trotter did not refer to or present argument concerning the court's instruction that mental or emotional disturbance constitutes relevant mitigation evidence. Trotter argued that

Wood had been drinking on the day of the crime and had been motivated by jealousy and anger resulting from his belief that his former girlfriend was involved in a relationship with another man and that "[h]is reasoning could have been clouded by the different emotions and the alcohol that he was having." J.A. 71.

By the statutory minimum vote of 10 to 2 (*see* J.A. 84), the jury recommended that Wood be sentenced to death. *See* ALA. CODE § 13A-5-46 (1994). Immediately following the jury recommendation, the judge dismissed the jury and scheduled a sentencing hearing for December 2, 1994. *See* J.A. 84. On October 26, 1994, Ralph wrote Trotter, with a copy to Dozier, directing Trotter to be prepared to make "arguments concerning the existence of aggravating and mitigating circumstances [at the December 2 hearing] . . . since you handled that phase of this case in chief." J.A. 342.

Four weeks later, and nine days before the final sentencing hearing, Trotter responded to Ralph and Dozier asking for their help in preparing for the sentencing hearing, and recommending that they "request an independent psychological evaluation—even if that means asking for a postponement of the sentencing hearing." J.A. 343-46. According to Trotter, his co-counsel rejected his recommendation because "they didn't think the Judge would grant a continuance." J.A. 285. Trotter dropped the matter.

At the sentencing hearing on December 2, 1994, "[n]o further evidence or testimony was offered other than the presentence report ordered to be prepared by the probation and parole office; and [the Kirkland Report] was offered by the defendant; and argument was made by both parties." (R. Vol. 6, Tr. 1114.)

Dozier argued that Wood acted "out of rage, heat of passion or whatever" and had been drinking that day. J.A. 87. Trotter added that "evidence of a difficult family history" and "[a]lso the fact that, as reported in the [Kirkland Report], that Holly cannot use abstraction skills much beyond the low average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning . . . would mitigate any aggravating circumstances in this case, and would require that the proper sentence for [this] case be life in prison without parole and not death." J.A. 88.

One week later, on December 9, 1994, the trial court found that the State had proven three aggravating circumstances and that there were no mitigating circumstances. *See* J.A. 106-07. The court accepted the jury's recommendation and sentenced Wood to death by electrocution. *See* J.A. 96. Wood's conviction and sentence were affirmed on direct appeal. *See* J.A. 109, 125.

II. STATE COURT POST-CONVICTION PROCEEDINGS

On November 30, 1999, Wood filed a petition for post-conviction review under Alabama Rule of Criminal Procedure 32. (R. Vol. 18, 48-213.)[1] Among other claims, Wood sought relief on the ground that his counsel had rendered ineffective assistance at the penalty phase of his trial by failing to investigate and present evidence of his mental impairments, in violation of his Sixth and Fourteenth Amendment rights. The state post-conviction court held evidentiary hear-

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[1] Wood filed a Second Amended Petition, which is the subject of this appeal, on July 2, 2001. *See* J.A. 212-54.

ings on Wood's claims on September 18, 2000, August 22, 2001, and August 4, 2003.[2]

A. Trial Counsel's Division Of Labor

Each of Wood's trial counsel testified that Trotter was assigned to handle the penalty phase of the trial. According to Dozier, he and Ralph "just basically designated Trotter to do the sentencing aspect" of the trial and Trotter "handled the aggravating circumstances and mitigating circumstances as far as the sentencing process went." J.A. 139. Ralph confirmed that he and Dozier "told Ken Trotter to handle [the penalty phase] early on; that that was going to be his responsibility." J.A. 198.

Dozier did not recall much regarding the preparation for and conduct of the penalty phase of Wood's trial. When asked to describe counsel's general strategy at the penalty phase, Dozier testified: "Only thing I remember was something about his childhood, and I don't recall what it was all about.

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[2] On November 27, 2001, after the first two days of evidentiary hearings and after precluding testimony from Wood's independent psychologist, the state court issued an order denying Wood's claims in their entirety. *See* Pet. App. 154a-226a. The order was adopted verbatim from an order proposed by the Alabama Attorney General's Office. *See* Pet. App. 226a. On April 25, 2003, the Alabama Court of Criminal Appeals remanded the case to the state post-conviction court "with instructions that the court conduct an evidentiary hearing on and make specific, written findings of fact as to the appellant's contentions that he is mentally retarded and that his trial attorneys rendered ineffective assistance because they did not develop and present evidence that he is mentally retarded." J.A. 389. Subsequently, on August 4, 2003, the state court held an additional evidentiary hearing.

I mean, that's been a long time ago." J.A. 167.[3] Although Dozier claimed that he and Ralph participated in the preparation for the penalty phase, he could not recall speaking to any potential penalty phase witnesses. *See* J.A. 140. According to Dozier, "[w]e went over the motions with Mr. Trotter . . . psychological evaluations and things we felt were necessary at the sentencing stage." J.A. 140. Ralph also testified that he had little involvement in preparing for the penalty phase other than deciding that "Ken Trotter would handle it." J.A. 198. According to Ralph, he spoke with Wood's father and one or two of his sisters during and after the guilt or innocence phase of the trial. *See* J.A. 205.

Consistent with his co-counsel's testimony, Trotter testified that he was initially assigned to assist Dozier and Ralph who were to be "the principal spokespersons for Holly in the courtroom." J.A. 270-71. But "shortly before the trial, a decision was made, not by me, that I would represent Mr. Wood during the penalty phase in the courtroom." J.A. 271. His co-counsel told him, "Ken, you're going to have to handle this part of the trial," so Dozier and Ralph "could focus on the first phase of the litigation." J.A. 271. As a result, Trotter "did a lot of the background research and material for the penalty phase." J.A. 279. For a period of time, Trotter felt "stressed" and

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[3] In contrast, Dozier was clear about the strategy at the guilt or innocence phase for which he was responsible, which was to establish that the State could not prove that there was sufficient evidence to show that Wood committed a burglary, in which case, under Alabama law, "[t]here would be no capital murder." J.A. 153; *see also* J.A. 205 (Ralph testifying extensively about their strategy to undermine the State's burglary case).

like he was carrying a "large burden" because he "was having to do a lot of work independently, more so than I thought when I initially accepted the appointment from Judge Barr." J.A. 290-91. In August 1994, Trotter described his predicament in a letter to Kevin Doyle of the Southern Poverty Law Center: "I have been stressed out over this case and don't have anyone with whom to discuss the case, including the two other attorneys." J.A. 350.

B. Trial Counsel's Mitigation Investigation

Trotter's mitigation investigation consisted principally of interviews with Wood's family at the courthouse. With respect to the Kirkland Report's indication that Wood was functioning, at most, in the borderline range of intellectual functioning, Trotter testified that "I don't recall considering that. I don't recall anything about that actually." J.A. 288. According to Trotter, after counsel received the Kirkland Report, "there may have been a discussion about whether we should do anything further and . . . Mr. Dozier had indicated that he had looked at the report and that he didn't think anything in the report really merited—that there was nothing in the report that merited going further." J.A. 283.

Dozier testified that he did not specifically recall reading the Kirkland Report before the trial, meeting with Dr. Kirkland, or speaking with him. J.A. 174.[4] Nor did he recall considering using Dr. Kirkland's report at the penalty phase or

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[4] Dozier's fee declaration indicates that he reviewed the Kirkland Report for one hour on May 24. *See* J.A. 313. There are no other references to the Kirkland Report or to any other investigation of Wood's mental impairments on Dozier's fee declaration.

"mak[ing] a determination not to present evidence based on anything that [he] read in Kirkland's report." J.A. 168, 171. Dozier testified that counsel would have presented information regarding "mental health problems" to the jury if any were available and would have presented useful information in the Kirkland Report to the jury. J.A. 169. But counsel did "[n]o further investigation" (J.A. 12) of the "mental health problems" referred to in that Report.

In late June, Trotter issued a subpoena to Luverne High School for Wood's school records. *See* J.A. 339. Trotter also had two very brief telephone calls with individuals at Luverne High School (*see* J.A. 267-68, 320), but did not seek to enforce the subpoena and never obtained any of Wood's school records. *See* J.A. 267. Nor did he make any effort to identify any of Wood's special education teachers or to contact them directly. Trotter did not remember whether he asked Wood for this information. *See* J.A. 268.

In September 1994, Trotter moved for production of documents regarding Wood from the Alabama Department of Corrections, the Alabama Department of Pardons and Paroles and the Alabama Department of Human Resources (R. Vol. 8, 456-61), but did not take steps to see that those records were produced before trial. Less than three weeks before the trial commenced, Trotter wrote Ralph: "I still haven't seen any material from the judge regarding the records we requested. . . . Is there anything we can do about this?" J.A. 341.

Wood's counsel retained a private investigator, R.C. "Pete" Taylor, but Taylor played no role in investigating the mental impairments identified in the Kirkland Report. Taylor took his directions from

Dozier, not Trotter who was only responsible for the penalty phase. *See* J.A. 263-64. Taylor testified that Dozier instructed him to "arrange to see the evidence that the Troy Police Department had" and that they "agreed on people to be interviewed." (R. Vol. 17, Aug. 22, 2001 Tr. 88.) Taylor's contemporaneous notes of his interviews and invoices reflecting his activities indicate that he investigated the circumstances surrounding the crime—not any potential mitigation evidence. *See* J.A. 351-68.

In addition, counsel met with Wood in February 1994, prior to the time that Trotter was assigned responsibility for the penalty phase. *See* J.A. 312, 319. Trotter did not recall what he discussed with Wood. *See* J.A. 303, 306. As a general matter, Trotter testified that "Mr. Wood was more or less a passive participant in the process." J.A. 288. Counsel "would try to get information from him, but . . . it was difficult in the circumstances." J.A. 288.

Trotter met with Wood's family members at the courthouse and "that is how [he] identified the witnesses that we used at the penalty phase." J.A. 277. Trotter did not recall when he met with Wood's family and whether there was more than one such meeting at the courthouse. *See* J.A. 277. But two of Wood's sisters, including Johnnie Pearl Wood who was a witness at the penalty phase proceeding, testified that they did not meet with Trotter (or Wood's other lawyers) at the courthouse until after Wood had been convicted. *See* (R. Vol. 17, Aug. 22, 2001 Tr. 121.)

Trotter tried to get information from Wood's family "about Holly's upbringing, his background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything that we

could use to humanize Holly to make him seem more real to the jury. . . ." J.A. 278. Based on those discussions, Trotter developed the penalty phase presentation which the Alabama Supreme Court described as "meager" and "scant." J.A. 131.

Trotter "objected at a couple of points to handling the penalty phase of the trial." J.A. 271. He did not "think that we were actually prepared to move forward with the penalty phase of the trial when we moved forward with the penalty phase." J.A. 271. But "after consultation with Mr. Dozier and Mr. Ralph that their concerns about that were alleviated" and "at their direction, I went ahead and proceeded." J.A. 271.

With regard to the penalty phase presentation, Ralph testified that "I don't think that Mr. Trotter—and it's no disrespect to Mr. Trotter—brought out enough of Mr. Wood's background through enough witnesses of the type of upbringing that he had" and that "there were more circumstances in his background that were potentially mitigating that were not explored. . . ." J.A. 184-85. Notwithstanding that view, Ralph did nothing to supplement Trotter's presentation and then assigned him to handle the final sentencing proceeding before the trial court. *See* J.A. 342.

C. Evidence Of Wood's Significant Mental Deficiencies

Wood's former teachers testified that, based on assessments of his intellectual and adaptive functioning, he was placed in special education classes and classified as "educable mentally retarded." J.A. 402-03, 408. His teachers recalled that his IQ was in the low to mid 60s. *See* J.A. 403. The special education

classes were held in the basement of the school, where basic life skills, such as cooking, were taught. *See* J.A. 407; (R. Vol. 16, Sept. 18, 2000 Tr. 131; R. Vol. 17, Sept. 18, 2000 Tr. 211-13.) The teachers explained that special education classes were structured environments where students worked at their own ability levels on assignments that were specifically tailored to them (*see* J.A. 404), and that the special education students like Wood typically only received a first grade to sixth grade level education, notwithstanding their classification as seventh, eighth, or ninth grade students. (*See* R. Vol. 17, Sept. 18, 2000 Tr. 215.) Most special education students worked at a first, second or third grade level, and fourth, fifth and sixth grade levels were considered "extremely high." J.A. 415. His teachers testified that Wood was an "average" special education student who functioned in the "middle to low" range. J.A. 403, 414.

Wood's former teachers each testified that neither Wood's trial counsel nor his investigator contacted them in 1994, and that, if they had been contacted, they would have cooperated and agreed to testify at Wood's trial in 1994. *See* J.A. 406, 416-17; (R. Vol. 16, Sept. 18, 2000 Tr. 128, 148; R. Vol. 17, Sept. 18, 2000 Tr. 215).

Two of Wood's sisters, Johnnie Pearl Wood and Maeola Wood, confirmed that he had been in special education classes. Maeola Wood was also placed in special education classes and received a third grade education even though she completed school and received a high school diploma. (*See* R. Vol. 16, Sept. 18, 2000 Tr. 181.) They testified that special education classes were held underground and that Holly Wood was referred to as a "retard" or "mole hole" by

other students. (*See* R. Vol. 16, Sept. 18, 2000 Tr. 168.) Maeola Wood also testified that she had been diagnosed as mentally retarded. (*See* R. Vol. 16, Sept. 18, 2000 Tr. 195-96.)

Wood's expert psychologist, Dr. Karen Salekin, and the State's experts, Dr. Harry McClaren and Dr. Greg Prichard, all agreed that "Wood's IQ falls within the range of mentally retarded," (J.A. 447, 491, 508, 541) and that his "functional academics are very low, like second to fourth grade level," which is "an area that he functions in the mentally retarded range." J.A. 507.[5] Based on her assessment, Dr. Salekin concluded that Wood suffers from mild mental retardation. *See* J.A. 450. Although the State's experts reached a different conclusion about whether Wood is mentally retarded, both of them found that he has significant deficits in intellectual functioning and significant deficits in one area of adaptive functioning. *See* J.A. 507-08, 530, 541.

D. The State Court Decision

The state court denied Wood's ineffective assistance claim on September 24, 2003. The court found that Wood had "failed to establish deficient performance," concluding that "counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation," and "could have decided against seeking another mental health evaluation, in order to prepare other, more promising, defenses for trial." Resp. App. 51. In addition, the state court concluded that there is

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[5] Each of the psychologists assessed Wood's functioning in the context of the clinical definitions of mental retardation referred to by this Court in *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002).

"no reasonable probability" that the presentation of evidence concerning Wood's mental deficiencies "would have changed the jury's ten to two recommendation of a death sentence or this Court's finding that the aggravating circumstances outweighed the mitigating circumstances" in light of the "brutal[]" nature of the crime. Resp. App. 55-56. The state court also concluded that its "finding that Wood is not mentally retarded further supports the conclusion that there is no reasonable probability that the presentation of evidence concerning his alleged mental retardation would have affected the outcome of this case." Resp. App. 56.

On January 6, 2004, the Alabama Court of Criminal Appeals affirmed and adopted the state court's findings. *See* J.A. 589. The Alabama Supreme Court denied Wood's petition for a writ of certiorari. *See* J.A. 4.

III. FEDERAL COURT HABEAS CORPUS PROCEEDINGS

On May 26, 2004, Wood filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Alabama asserting, *inter alia*, that he received ineffective assistance of counsel during the penalty phase of his trial. *See* J.A. 4. Specifically, Wood asserted that trial counsel failed to investigate and present mitigation evidence of his substantial mental deficiencies. *See* J.A. 621-23.

By order dated November 20, 2006, the District Court (Albritton, J.) granted Wood's habeas petition on that ground, after finding "nothing in the record to even remotely support a finding that counsel made a strategic decision not to let the jury at the penalty stage know about Wood's mental condition." Pet.

App. 147a. The District Court held that "clear and convincing record evidence indicates that Trotter, who did not have the requisite years of experience, was left to conduct the mitigating evidence investigation on his own with little assistance from the attorneys who had the requisite experience, and did not make a strategic decision not to pursue or present evidence of mental retardation." Pet. App. 146a. The District Court concluded that "[a] finding by the state courts that a strategic decision was made not to investigate or introduce to the sentencing jury evidence of mental retardation is an unreasonable determination of the facts in light of the clear and convincing evidence presented in the record." Pet. App. 147a.

The District Court further found that "there is a reasonable probability that evidence of Wood's intellectual functioning, even if it had not been enough to establish that he was mentally retarded and had merely demonstrated that he was on the borderline of mental retardation, would have established a non-statutory mitigating circumstance" and that "[c]ounsel's failure to investigate and present any evidence of intellectual functioning, therefore, is sufficient to undermine confidence in the application of the death sentence." Pet. App. 151a.

Accordingly, the District Court ordered the State "to either (1) vacate Holly Wood's sentence and resentence him to life without possibility of parole, or (2) conduct a new sentencing hearing for Holly Wood that is consistent with the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984)." Pet. App. 152a.

On appeal, a divided panel of the Eleventh Circuit reversed. *See* Pet. App. 1a-98a. Describing the appeals court's obligation under the Antiter-

rorism and Effective Death Penalty Act of 1996 ("AEDPA") as "examining whether there is evidence to support the state courts' findings" (Pet. App. 50a n.23), Judge Hull, writing for the majority, determined that the "evidence amply supports the state courts' fact findings that experienced counsel (1) decided calling Dr. Kirkland would not be in Wood's best interest, and (2) decided against presenting mental health evidence." Pet. App. 50a. Based on those determinations, the majority held that Wood had "failed to show the state courts made an unreasonable determination of the facts" because "[a]t a minimum, Wood has not presented evidence, much less clear and convincing evidence, that counsel did not make such decisions about [the Kirkland Report] and a mental health defense." Pet. App. 50a n.23. The majority also held that Wood had failed to establish prejudice. *See* Pet. App. 61a-71a.

The Eleventh Circuit dissent noted that the majority's "conclusion ignores specific and direct evidence of ineffectiveness of counsel in favor of nothing but pure speculation that the failure to investigate and present mitigating evidence was a 'strategic decision.'" Pet. App. 73a. The dissent also found that "[a] fair reading of the entire record compels the conclusion that Wood's lawyers, in fact, did not adequately prepare for the penalty phase and their direct testimony concedes as much." Pet. App. 74a. As for prejudice, the dissent stated that "evidence of Wood's mental deficiencies was essential to mitigation" and, given the statutory minimum death penalty vote of 10 to 2, "there is a reasonable probability that the outcome of Wood's penalty phase would have been different had Wood's lawyers rendered effective assistance of counsel." Pet. App. 90a, 92a.

This Court granted Wood's petition for a writ of certiorari to the Eleventh Circuit on May 18, 2009. *See* J.A. 635.

SUMMARY OF THE ARGUMENT

"In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (citations omitted). Wood was denied the effective assistance of counsel at the critical penalty phase of his capital trial where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

In particular, counsel failed "to make [a] reasonable investigation[]" of Wood's mental deficiencies or to "make a reasonable decision" that made such an "investigation[] unnecessary." *Id.* at 691. As Trotter told the trial judge when the penalty phase began, in the five months after counsel received the Kirkland Report, "no further investigation" had been done of the "psychological problems" identified in that Report, even though those problems "need[ed] further assessment." J.A. 12. Nor had counsel learned anything during that five-month period that indicated that further investigation was unnecessary on the grounds that it "would have been counterproductive" or "fruitless." *Wiggins v. Smith*, 539 U.S. 510, 525 (2003). Accordingly, it was "impossible" for counsel to make "a fully informed decision" regarding whether and how to use the important information concerning Wood's mental deficiencies at the penalty phase of Wood's trial. *Id.* at 527-28.

The Eleventh Circuit's judgment reversing the District Court's grant of habeas relief on Wood's ineffective assistance claim should be reversed for three alternative and independent reasons. First, even accepting the facts found by the state court, trial counsel were ineffective because they terminated their investigation into Wood's mental deficiencies in the face of facts that any reasonable defense lawyer would have understood required follow-up, not abandonment, of a promising avenue of mental health mitigation that was Wood's best chance for a sentence less than death. The state court's contrary decision involved an unreasonable application of clearly established federal law as reflected by this Court's decisions in *Strickland* and *Wiggins*.

Second, the state court decision was also based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) in light of the totality of the evidence presented in the state court proceeding. *See Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) ("*Miller-El II*"). The state court decision denying Wood's ineffective assistance claim (which was taken verbatim from the State's proposed order) does not even address the "record of the actual sentencing proceeding," which "underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. Counsel failed to pursue a reasonable investigation into Wood's mental deficiencies due to the delegation of the sentencing phase to an inexperienced attorney, the lack of clear lines of supervision of Trotter, and the disorganization and lack of communication among counsel, which allowed critical functions to slip through the cracks. To the extent

that the state court found otherwise, its decision was objectively unreasonable.

In reaching its conclusion, the state court focused on isolated evidence that counsel did some investigation preceding the penalty phase by interviewing Wood's family and making feeble and unsuccessful attempts to obtain Wood's school records and records from state agencies. But the fact that counsel "had *some* information with respect to petitioner's background" fails to establish that "they were in a position to make a tactical choice not to present" evidence of Wood's mental deficiencies. *Id.* at 527 (emphasis in original).

In reversing the District Court's grant of habeas relief on Wood's ineffective assistance claim, the Eleventh Circuit majority misapplied AEDPA by "merg[ing] the independent requirements of §§ 2254(d)(2) and (e)(1)." *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) ("*Miller-El I*"). Those two sections have distinct purposes consistent with the plain language and structure of the statute. The Eleventh Circuit majority lost sight of its duty to assess the *reasonableness* of the state court decision in light of the *entirety of the state court record* as (d)(2) requires, and improperly imposed on Wood an additional burden reserved under (e)(1) for measuring the *correctness* of *individual findings of fact* in certain cases.

Third, even if (e)(1) were construed to apply to individual or subsidiary findings of fact in cases where there is no evidence outside the state court record, the individual fact findings made by the state court here are rebutted by clear and convincing evidence, thus entitling Wood to relief.

Finally, the deficient performance of Wood's counsel prejudiced him. Wood's jury was deprived of the opportunity to give "full consideration of evidence that mitigates against the death penalty," which "is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character and crime.'" *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (emphasis in original). The Alabama Supreme Court found that Wood's counsel overall "presented little evidence of mitigating circumstances." J.A. 131. The jury never heard the powerful mitigating evidence of Wood's mental deficiencies, including that Wood has an IQ in the range of mental retardation, possesses reading, spelling and mathematics skills at an elementary-grade level, and was classified as "educable mentally retarded" and placed in special education classes. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000). Had this evidence been presented to the jury, it very likely would have resulted in at least one more vote for a sentence of life without parole.

ARGUMENT

I. THE STATE COURT DECISION INVOLVED AN UNREASONABLE APPLICATION OF *STRICKLAND* BECAUSE COUNSEL FAILED TO MAKE A REASONABLE INVESTIGATION OF WOOD'S MENTAL DEFICIENCIES PRIOR TO HIS CAPITAL TRIAL

Wood's counsel failed to conduct a reasonable investigation into Wood's substantial mental deficiencies for purposes of mitigation even though they were alerted to those deficiencies in the Kirkland Report five months prior to trial. Under clearly established federal law, counsel's failure to pursue and investigate the leads in the Kirkland Report, as any rea-

sonably competent defense lawyer would have done, amounted to constitutionally ineffective assistance.

It is clearly established federal law that, in a capital trial, "counsel has a duty to make reasonable investigations [into potential mitigation evidence] or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. In *Williams* and *Wiggins*, this Court held that habeas petitioners were entitled to relief under AEDPA because their counsel failed to conduct a reasonable investigation of potential mitigation evidence in support of supposed tactical decisions regarding capital sentencing proceedings. The state court decisions denying Wood's ineffective assistance claim do not even cite *Williams* or *Wiggins*.[6]

A. Under This Court's Clearly Established Precedents, Decisions Not To Present Mitigation Evidence After Less Than Complete Investigation Are Reasonable Only To The Extent That Reasonable Professional Judgments Support The Limitation On Investigation

To satisfy the Sixth Amendment guarantee, counsel must comport with "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. Beginning with *Strickland*, this Court repeatedly has held that this duty is not met where counsel's decisions regarding the presentation of mitigation

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[6] *Wiggins* was decided after the state court's initial decision denying Wood's ineffective assistance claim, but prior to that court's subsequent decision after remand for further proceedings from the Alabama Court of Criminal Appeals.

evidence are not informed by reasonable investigations:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 690-91.

Thus, in *Williams*, this Court held that trial counsel were constitutionally ineffective, thereby entitling a habeas petitioner to relief under AEDPA, where among other things "[c]ounsel failed to introduce available evidence that Williams was 'borderline mentally retarded'" because counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background" prior to the sentencing proceeding of his capital trial. *Williams*, 529 U.S. at 396; *see also id.* at 415 (O'Connor, J., concurring) (counsel failed "to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances").

In *Wiggins*, the Court reaffirmed the clearly established law that trial counsel's decisions regarding the presentation of mitigation evidence must be informed by reasonable investigations of potential mitigation evidence. The Court rejected counsel's "attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating

evidence at sentencing and to pursue an alternate strategy instead" because "counsel were not in a position to make a reasonable strategic choice" as "the investigation supporting their choice was unreasonable." *Wiggins*, 539 U.S. at 521, 536. As the Court explained, trial counsel's investigation was unreasonable because they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524.

The Court held that "any reasonably competent attorney would have realized that pursuing the[] leads [in public records] was necessary to mak[e] an informed choice among possible defenses . . . . Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless . . . ." *Id.* at 525. In other words, the limited information available to counsel operated as a "green light" to indicate the availability of potential mitigating evidence and to require counsel to investigate further unless and until they discovered additional information that operated as a "red light" to indicate that further investigation would be counterproductive or fruitless.

Applying AEDPA, this Court held that the state court's "assumption that the investigation was adequate . . . reflected an unreasonable application of *Strickland*" because "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. The Court further held that the state court's "deference to counsel's strategic decision not 'to present every conceiva-

ble mitigation defense,' despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable." *Id.* at 528 (citation omitted).

Strickland and *Wiggins* establish that once counsel are in possession of information that would lead a reasonable attorney to investigate further, it is unreasonable for counsel to halt their investigation unless and until further investigation yields additional information supporting a decision to do so.

B. The Kirkland Report Constituted A "Green Light" That Would Have Led Any Reasonably Competent Defense Attorney To Investigate Further

"In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688, 689). An objective review of counsel's performance measured against the norms prevailing in Alabama, as seen from their "perspective at the time," plainly demonstrates that their "investigation" of Wood's mental disabilities was unreasonable.

Investigations "into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)). In particular, "experienced capital defense

attorneys categorically reject the idea that the utility of evidence relating to the defendant's background or mental health can be determined before an investigation." Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 341-42 (1993); *see* Ala. Capital Representation Resource Ctr., *Alabama Capital Defense Trial Manual* (2d ed. 1992) at 27-28 ("Extensive pretrial investigation is absolutely critical in a capital case. . . . Counsel can never gather too many details concerning the facts and circumstances of each case"). Wood's counsel's performance fell far short of these norms, which prevailed in Alabama at the time of his trial.

The Kirkland Report revealed that Wood had significant mental impairments, including that he was "functioning, at most, in the borderline range of intellectual functioning." J.A. 328. In addition, the Report stated that Wood previously had been found to be "reading on a 3rd grade level" and was "still reading on less than a 3rd grade level" (J.A. 327), and that Wood "could not use abstraction skills much beyond the low average range of intellect." J.A. 328.

The information contained in the Kirkland Report would have put a reasonable defense lawyer on notice of Wood's significant mental impairments. Even ignoring Dr. Kirkland's cautionary "at most" formulation, evidence of borderline mental retardation is plainly mitigating. *See Williams*, 529 U.S. at 396 (counsel unreasonably failed to introduce evidence that Williams was "borderline mentally retarded"); *Tennard v. Dretke*, 542 U.S. 274, 287-88 (2004) ("impaired intellectual functioning [evidenced by an IQ score of 67] is inherently mitigating" and obviously evidence that "might serve as a 'basis for a

sentence less than death'"). Such evidence "is exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004); *see* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 1035, 1051 (2008) ("data suggests that evidence of borderline mental retardation or other forms of cognitive impairments are important in many cases even though the mental retardation threshold is not satisfied"); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998) (same). Indeed, at the sentencing hearing before the trial judge, Trotter briefly referred to the Kirkland Report as mitigating evidence "that Holly cannot use abstraction skills much beyond the low average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning." J.A. 88. In doing so, Trotter acknowledged (feebly and belatedly) the importance of mitigation evidence regarding Wood's mental impairments.[7]

Any reasonable defense attorney would have regarded the Kirkland Report as the beginning, and not the end, of an inquiry into Wood's mental impairments. That Report was prepared to assist the *court* in determining Wood's "competency to stand trial and

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[7] Under Alabama law at the time of Wood's capital trial, the jury issued an advisory verdict on sentencing, which the trial court could override. *See* ALA. CODE §§ 13A-5-46, 13A-5-47 (1994). But "the role of the advisory jury is so essential that a failure to present mitigating evidence to the jury cannot easily be cured at the judicial sentencing stage." *Brownlee v. Haley*, 306 F.3d 1043, 1075 (11th Cir. 2002).

mental state at the time of the offense" (J.A. 323), and did not purport to fully evaluate Wood's intellectual functioning.[8] Nor did the finding of competency negate the potential for significant mental health mitigation evidence. "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial." *Atkins*, 536 U.S. at 318. It follows that "[o]ne can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider." *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

"In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. The Kirkland Report constituted a "green light" based on which "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Wiggins*, 539 U.S. at 525; *see Jells v. Mitchell*, 538 F.3d 478, 496 (6th Cir. 2008) ("counsel's awareness of Jells's unstable home environment and academic difficulties should have alerted them that further investigation by a mitigation specialist might [have] proved fruitful").[9]

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[8] In his Report, Dr. Kirkland referenced a separate November 1992 evaluation (*see* J.A. 327), which was not appended to that Report or provided to Wood before the penalty phase.

[9] Thus, the Eleventh Circuit misapplied *Wiggins* when it attempted to distinguish it on the grounds that Wood's counsel "investigated and knew about his borderline intellectual functioning *before* deciding not to present mental health evidence to the jury" and that "the post-conviction evidence was consistent with Dr. Kirkland's report and the other evidence already in

Indeed, Dozier testified that evidence of "mental health problems" would have been "relevant to the penalty phase" and counsel would "have presented [such evidence] at the penalty phase." J.A. 169. But in the five-month period between obtaining the Kirkland Report and trial, counsel took no steps to investigate the mental health problems revealed by that Report as Trotter told the court on the morning of the sentencing hearing. *See* J.A. 12.

The state court recited that Dozier "affirmed that they [counsel] diligently pursued the information that was contained within the Kirkland report." Resp. App. 48. Even if that statement were misconstrued as the state court's conclusion, rather than a characterization of Dozier's testimony, it amounts to a legal conclusion about counsel's conduct with no supporting factual basis. The only source of information, which the state court identified, that counsel obtained concerning Wood's mental deficiencies is the Kirkland Report itself. The state court did not make *any* findings of historical fact that counsel took any action, went anywhere, or spoke to anyone in an effort to follow up on that information.[10]

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counsel's possession." Pet. App. 58a n.28 (emphasis in original). The same was true in *Wiggins* where counsel "had *some* information with respect to petitioner's background" prior to the penalty phase. *Wiggins*, 539 U.S. at 527 (emphasis in original). But that did not mean that "they were in a position to make a tactical choice not to present a mitigation defense" because "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Id.*

[10] Dozier had no specific recollection of reading the Kirkland Report prior to the trial, or meeting with or speaking to Dr. Kirkland. *See* J.A. 174. The only statement Dozier made about the Report is that "I think it indicated that Holly Wood had

On the contrary, the record reveals that consistent with Trotter's statement that "[n]o further investigation" of the Kirkland Report had been done (J.A. 12), counsel did not retain an independent psychologist to evaluate Wood for mitigation purposes, nor contact Wood's special education teachers or speak with his family concerning his experiences in special education, nor make any other effort to investigate further the information concerning Wood's mental disabilities in the Kirkland Report.[11] Moreover, counsel did not learn anything after obtaining the Kirkland Report that supported any decision to limit their investigation. As in *Wiggins*, merely reading the Kirkland Report and deciding not to follow up on the information contained in it was not a sufficient investigation because "counsel chose to abandon their investigation at an unreasonable juncture." *Wiggins*, 539 U.S. at 527.

While counsel are not required to run down blind alleys where "more promising" avenues lie open to inquiry (Resp. App. 51), there was never a "red light" that justified counsel's failure to pursue the mitigation issues raised by the Kirkland Report.[12] To the

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childhood problems at a younger age or something like that," but admitted that "I just don't recall all this" (J.A. 150), and later stated that "I don't think [Dr. Kirkland] discovered any childhood problems." J.A. 173. Thus, at best, Dozier's testimony amounts to speculation about information unrelated to Wood's mental deficiencies.

[11] Counsel's fee applications indicate that Dozier and Ralph reviewed the Kirkland Report on May 24 and that Trotter spoke to Dr. Kirkland for 30 minutes on May 10. *See* J.A. 313, 315, 319. Beyond that, there is no indication that counsel made any meaningful attempt to investigate Wood's mental condition.

[12] Counsel's failure to pursue these issues cannot be excused by the truism in every case that "counsel does not enjoy

extent that Wood's counsel made a conscious decision not to present evidence of Wood's mental impairments as mitigation (*see* Resp. App. 51), that decision was made without reasonable investigation, "making a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527-28.

Indeed, Wood's counsel's performance fell far short of that which this Court held was ineffective in *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Rompilla*, counsel's failure to "enquire further" occurred only after counsel had expended substantial effort "to find mitigating evidence by other means," including extensive interviews with family members and employing the services of *three* mental health experts who reported to counsel that they had found "nothing that could be used as mitigation evidence." *Id.* at 388-92; *Commonwealth v. Rompilla*, 721 A.2d 786, 790 (Pa. 1998). In contrast, Wood's counsel failed to conduct any meaningful investigation specifically of Wood's mental deficiencies, and as Trotter belatedly told the trial court, the Kirkland Report did not present a blind alley, but rather raised issues that "need further assessment." J.A. 12.

Accordingly, the state court's decision denying Wood's ineffective assistance claim involved an unreasonable application of *Strickland*, *Williams* and *Wiggins*.

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the benefit of unlimited time and resources." Resp. App. 51 (citation omitted). In light of counsel's "meager" mitigation presentation (J.A. 131 n.1) and the meager investigation that produced it, counsel's failure to pursue important information concerning Wood's mental disabilities as potential mitigation cannot be explained by any cost/benefit analysis regarding limitations on their time and resources.

II. THE STATE COURT DECISION WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT

Even if the state court's statement that Dozier affirmed that counsel "diligently pursued the information that was contained within Dr. Kirkland's report" (Resp. App. 48) were misconstrued as the state court's conclusion, rather than its characterization of Dozier's testimony, and also as an ultimate finding of fact, rather than a legal conclusion concerning counsel's conduct, the state court decision was based on an unreasonable determination of the facts in light of the entire state court record, much of which the state court simply ignored.

Under section 2254(d)(2), habeas relief is warranted where the federal court determines that a state court decision is "objectively unreasonable in light of the evidence presented in the state court proceeding." *Miller-El I*, 537 U.S. at 340 (*citing* § 2254(d)(2) and *Williams*, 529 U.S. at 399 (O'Connor, J., concurring)). That assessment "turns on a consideration of the totality of the 'evidence presented in the state court proceeding.'" *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005).

This Court has held that the "objectively unreasonable" standard in section 2254(d)(2) imposes a highly deferential standard for federal court review of state court habeas decisions. *See Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). But the standard is not beyond reach and is met when the reviewing court concludes from examining all the evidence that

the determination of the facts falls outside the broad range of reasonable decision-making and that a different outcome is compelled. In *Miller-El II*, 545 U.S. at 265, involving claims of jury discrimination, this Court held that a petitioner was entitled to relief under section 2254(d)(2) where "[i]t is true . . . that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination."

As discussed below, the state court's decision that trial counsel conducted a diligent investigation of Wood's mental deficiencies raised in the Kirkland Report is objectively unreasonable based on the totality of the evidence in the state court record. A reasonable fact finder would be compelled to have ruled differently than the state court did. In Part II.A., we show that the Eleventh Circuit erred in making this determination because it applied the wrong test, requiring that the showing of unreasonableness be made by clear and convincing evidence, which reflects an improper merging of (d)(2) and (e)(1). In Part II.B, we show that had the Eleventh Circuit applied the correct test, it would have been compelled to find that the ultimate fact determination was unreasonable in light of the entire state court record. This is true for two separate but interrelated reasons. First, the facts, when viewed as a whole, are "too powerful" to lead to any other conclusion. Second, even if (e)(1)'s clear and convincing requirement is applied to the state court's subsidiary fact findings, there is clear and convincing evidence that those subsidiary fact findings are incorrect and cannot support the ultimate finding that Wood's trial counsel conducted a diligent investigation. Therefore, even if (e)(1)

applies to a case in which the evidence is limited to the state court record—contrary to the most sensible reading of the statute—Wood is still entitled to relief based on the facts in this case.

A. The Eleventh Circuit Used The Wrong Standard For Assessing The Reasonableness Of State Court Decisions Under Section 2254(d)(2), Which Is Distinct From, And Operates Independently Of, Section 2254(e)(1)

Two distinct sections of AEDPA govern the deference that a federal habeas court must give to state court factual determinations. Under 28 U.S.C. § 2254(d)(2), a federal court may grant a writ of habeas corpus where the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" by a federal court and "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

This Court has stated that sections 2254(d)(2) and (e)(1) are independent and should not be conflated as the Eleventh Circuit majority did in this case and as that court has done in other cases:[13]

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[13] *See LaMarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 942 (11th Cir. 2009) ("[T]he state courts made factual findings . . . and LaMarca has not refuted these findings by clear and convincing evidence. Thus, LaMarca has not demonstrated the state courts' decisions were 'based on an unreasonable determination of the facts.'") (citations omitted); *Freeman v. Attorney*

"AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." *Miller-El I*, 537 U.S. at 341. In short, section 2254(d)(2) supplies a standard of review requiring a federal court to assess the reasonableness of the state court's "determination of the facts" in light of all the evidence presented in the state court record, whereas section 2254(e)(1) supplies a burden of proof for rebutting any specific state court "determination of a factual issue." It is thus "incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1)." *Id.* at 341.

Consistent with the Court's holding in *Miller-El I*, where a habeas petitioner seeks relief "based entirely on the state record," a federal court reviews the state court's fact findings for their reasonableness under 2254(d)(2). *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *cert. denied*, 543 U.S. 1038 (2004). The additional requirements of 2254(e)(1) do not apply in that situation, because the "challenge . . . is governed by the deference implicit in the 'unreasonable determination' standard of section 2254(d)(2)." *Id.* at 1000. If, however, a habeas petitioner challenges state court factual findings

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General, 536 F.3d 1225, 1234 (11th Cir. 2008) (affirming denial of habeas relief where the petitioner "has not demonstrated by clear and convincing evidence that the findings of the state court were unreasonable in light of the evidence presented during the post-conviction evidentiary hearing"), *cert. denied*, 129 S. Ct. 921 (2009); *Gilliam v. Sec'y for the Dep't of Corr.*, 480 F.3d 1027, 1032 (11th Cir. 2007) ("for a writ to issue because the state court made an 'unreasonable determination of the facts,' the petitioner must rebut 'the presumption of correctness by clear and convincing evidence'") (alteration omitted) (citation omitted), *cert. denied*, 128 S. Ct. 1697 (2008).

based in part on evidence that is extrinsic to the state court record, 2254(e)(1)'s requirements "come into play once the state court's fact-findings survive any intrinsic challenge" under 2254(d)(2). *Id.* In other words, those findings are presumed correct unless rebutted by clear and convincing evidence *that was not part of the state court record* (and was appropriately introduced in the federal habeas proceedings under 2254(e)(2)). *See id.*; *see also Lambert*, 387 F.3d at 235 ("the language of § 2254(d)(2) and § 2254(e)(1) implies an important distinction: § 2254(d)(2)'s reasonableness determination turns on a *consideration of the totality of the 'evidence presented in the state-court proceeding*,' while § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record") (emphasis added);[14] 1 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 20.2c (5th ed. 2005) (courts should consider first whether a state court's fact findings are reasonable under § 2254(d)(2), and if they are, only then should they apply § 2254(e)(1)'s presumption of correctness).

Although sections (d)(2) and (e)(1) are related to the extent that they both refer to a state court's factual findings, the plain language and structure of

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[14] In *Lambert*, the Third Circuit noted that some courts have concluded that application of (d)(2) should precede application of (e)(1), while others have found that application of (e)(1) should precede (d)(2). *Id.* at 236 n.19. The Third Circuit "adopt[ed] no rigid approach to habeas review," concluding that a federal court might apply those provisions in either order. *Id.* In either event, the Third Circuit made plain that "before the writ can be granted, petitioner must show an unreasonable determination—under (d)(2)—in *light of the entire record in the original state court trial*." *Id.* (emphasis added).

the statute demonstrate that they should not be imposed on top of each other as the Eleventh Circuit majority did in this case. Indeed, Congress' placement of these provisions in separate sections clearly demonstrates that they operate independently because courts must "give effect, if possible, to every clause and word of a statute." *Williams*, 529 U.S. at 404 (citations omitted); *see also Lambert*, 387 F.3d at 235 ("We . . . read § 2254(d)(2) and § 2254(e)(1) together as addressing two somewhat different inquiries" because "it is a cardinal rule of statutory interpretation that we must 'give effect, if possible, to every clause and word of a statute'") (citation omitted); *Taylor*, 366 F.3d at 999 ("We interpret these provisions sensibly, faithful to their text and consistent with the maxim that we must construe statutory language so as to avoid contradiction or redundancy"). As this Court stated in *FDA v. Brown & Williamson Tobacco Corp.*:

> It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole."

529 U.S. 120, 133 (2000) (citations omitted).[15]

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[15] If Congress had intended the clear and convincing evidence burden of (e)(1) to apply to the unreasonableness standard in (d)(2) it would have added that provision to subsection (d) instead of placing it in subsection (e) with the rules governing federal court evidentiary hearings.

Overlaying the burden of proof supplied in section (e)(1) on the standard of review supplied by section (d)(2) would render the statute "incoherent." *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 625-26 (1993). Congress did not enact such an incoherent statute. Rather, the statute refers in distinct sections to the different functions performed by a federal court in a federal habeas proceeding "in language appropriate to each." *Id.* at 624. It supplies a standard of review in section (d)(2) when the federal court acts as a reviewing court of state court factual determinations, and a burden of proof for rebutting state court factual findings when the federal court acts as an independent fact finder.

Moreover, the plain language of the provisions confirm that they operate independently to supply different standards for the two different capacities in which federal courts may act in federal habeas proceedings. The plain language of section (e)(1) specifies that a state court determination of a factual issue is "presumed to be *correct*" and that a federal habeas petitioner must rebut that "presumption of *correctness*" by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (emphasis added). In stark contrast, section (d)(2) requires the federal court to assess whether the state court decision was based on an "*unreasonable*" determination of the facts—not whether the facts are *correct*. 28 U.S.C. § 2254(d)(2). If Congress had intended the (e)(1) clear and convincing burden of proof to govern the (d)(2) standard of review for reasonableness, it would have written (e)(1) in terms of rebutting a presumption of reasonableness, rather than rebutting a presumption of correctness.

Furthermore, if rebutting individual state court fact findings under (e)(1) were a prerequisite to the grant of relief under (d)(2), state courts would have a perverse incentive to engage in little or no fact finding to insulate their decisions from any meaningful review. If the state court does not make fact findings, then none can be rebutted by clear and convincing evidence. And, if rebuttal of state court fact findings by clear and convincing evidence is a prerequisite to a finding that the state court decision was an unreasonable determination of the facts, then no such finding could follow where the state court engages in little or no fact finding. Surely, Congress did not intend that "far reaching and seemingly perverse" result. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). Instead, as set forth above, the standard of review found in (d)(2) and the burden of proof found in (e)(1) are separate provisions that fit together comfortably.

Contrary to Congressional intent as reflected by the language and structure of the statute, the Eleventh Circuit majority erroneously merged the clear and convincing evidence burden of proof set forth in section (e)(1) with the unreasonableness standard of review set forth in section (d)(2), by finding that Wood failed to show that the state court made an unreasonable determination of the facts because he failed "[a]t a minimum" to present "clear and convincing evidence" against that determination. Pet. App. 50a n.23. In other words, the Eleventh Circuit majority effectively superimposed section 2254(e)(1) on section 2254(d)(2) and required Wood to establish an unreasonable determination of the facts by clear and convincing evidence as a prerequisite to relief under section 2254(d)(2). That improper application of the burden expressed in (e)(1) for rebutting *individual*

factual findings in certain circumstances caused the Eleventh Circuit majority to lose sight of the totality of the state court record and of its statutory duty to make an *overall reasonableness determination* in light of that record. In doing so, the Eleventh Circuit majority imposed "too demanding a standard" on Wood that Congress did not intend, and disregarded this Court's teaching that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El I*, 537 U.S. at 340-41.

B. If The Eleventh Circuit Had Applied The Correct Standard, It Would Have Been Compelled To Find That The State Court's Ultimate Decision That Counsel Adequately Investigated The Information Concerning Wood's Mental Impairments In The Kirkland Report Was Objectively Unreasonable

Applying the proper standard under section 2254(d)(2), the state court determination was an objectively unreasonable determination of the facts in light of the totality of the state court record. This is true whether the evidence (including the evidence on which the state court did not make fact findings) is viewed as a whole, as it should be under section 2254(d)(2), or whether the subsidiary fact findings the state court *did* make are evaluated under (e)(1)'s "clear and convincing" requirement.[16] Either way, as the analysis below demonstrates, the ultimate determination that Wood's trial team adequately investi-

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[16] To rebut a factual finding by "clear and convincing evidence," it must be "highly probable" that the finding was erroneous. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

gated the crucial evidence revealed in the Kirkland Report is an objectively unreasonable determination of the facts.[17]

The Alabama Supreme Court, after describing counsel's penalty phase presentation variously as "meager," "scant," and consisting of "little evidence," "conclude[d] that neither the jury nor the trial judge acted unreasonably by finding that no mitigating circumstances existed in Wood's case." J.A. 131. Counsel's "meager" presentation was the product of an equally meager investigation, which did not include any further investigation of Wood's significant mental impairments revealed in the Kirkland Report.

The totality of the state court record shows that, in concluding otherwise, the state court failed to consider contemporaneous evidence of *what actually happened* leading up to and during the penalty phase. The state court's failure to consider this evidence renders unreasonable the state court's determination that counsel conducted further investigation into Wood's mental deficiencies that were raised in the Kirkland Report.

Trotter's statement on the morning of the penalty phase—that counsel had done no "further inves-

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[17] Although *Miller-El I* makes clear (537 U.S. at 341) that it is never appropriate to impose (e)(1)'s clear and convincing requirement *on top of* the petitioner's burden of showing objective unreasonableness under (d)(2), some courts have expressed their lack of confidence in subsidiary state court fact findings by noting that there was clear and convincing evidence that such findings were incorrect. Although this use of (e)(1) in a case where the facts are limited to the state court record is contrary to what we believe is the proper relationship between (d)(2) and (e)(1), we address it here to show that even under this approach, Wood is entitled to relief.

tigation" of the "psychological problems" identified in that Report (J.A. 12)—belies any finding that counsel conducted such an investigation. The state court's conclusion is further undercut by the undisputed fact that, after the penalty phase before the jury, but before sentencing by the trial court, Trotter wrote to his co-counsel reiterating that "we should request an independent psychological evaluation—even if that means asking for a postponement of the sentencing hearing [before the judge]." J.A. 343, 345. This contemporaneous documentary evidence further demonstrates that Trotter realized he had not done a reasonable investigation of potential mental health mitigation, rendering any decision with respect to the presentation of such evidence unreasonable. Moreover, the failure to follow through and request an independent psychological evaluation at that late date also was unreasonable because it was not based on a weighing of the pros and cons for Wood. Rather, it was based solely on Dozier's and Ralph's belief "that the judge would never grant a continuance." J.A. 285.[18]

As in *Wiggins*, the "record of the actual sentencing proceedings underscores the unreasonableness of

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[18] Counsel made no meaningful effort to obtain the independent psychological examination that Trotter belatedly concluded was necessary to a reasonable investigation of Wood's mental disabilities. As the trial court noted, counsel lodged no objection to proceeding with the penalty phase on the morning following the guilty verdict. J.A. 98. Moreover, in the six weeks between the jury's sentencing recommendation and the sentencing hearing before the trial court, counsel never followed through on the trial judge's statement that he would consider Wood's request for an independent psychological evaluation after the jury had rendered its penalty verdict and been released. J.A. 285.

counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. When viewed in light of that record, "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id.* at 526-27. Here the state court decision does not even acknowledge the evidence of what counsel actually said and did during the penalty phase, much less analyze it in any meaningful way. *See, e.g., Guidry v. Dretke*, 397 F.3d 306, 326-27 (5th Cir. 2005) ("The state trial court's omission, without explanation, of findings on evidence crucial to Guidry's habeas claim, where the witnesses are apparently credible, brought into question whether, under subpart (d)(2), its 'decision . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding'"); *Taylor*, 366 F.3d at 1008 ("Failure to consider key aspects of the record" resulted in a decision that was based on "an 'unreasonable determination of the facts'" in light of the state court record).

The Eleventh Circuit majority attributed the state court's determinations that Wood's counsel "made a reasonable judgment that another mental health evaluation was not necessary" and "could have decided against seeking another mental health evaluation, in order to prepare other, more promising defenses for trial" (Resp. App. 51) and other aspects of the mitigation investigation solely to Dozier, whom both courts labeled as "experienced" counsel. Pet. App. 50a, 58a. But Dozier could only speculate about what he "would have" done with respect to events *six*

years prior to his testimony because he had no specific recollection about what trial counsel did or why at the penalty phase, and had "no files" from Wood's case that might shed light on those issues. J.A. 146. Dozier could not recall making the supposed decision attributed to him:

> Q. Did you ever consider using Dr. Kirkland's report, the evaluation that we discussed, at the penalty phase?
>
> A. I don't recall. I'm sure I might have presented it at the sentencing phase. It's part of the court record, so I'm sure it was introduced somewhere.
>
> * * *
>
> Q. Did you, in fact, make a determination not to present evidence based on anything you read in Kirkland's report?
>
> A. I don't recall.

J.A. 168, 171. Dozier's testimony, which is riddled with "I don't recall," provides no basis for the state court's factual determinations.

Moreover, Dozier testified that he and Ralph "basically designated Trotter to do the sentencing aspect" of the trial. J.A. 139. According to Trotter, that decision was made by Dozier and Ralph "[s]hortly before the trial." J.A. 270. Trotter, who had no relevant experience, did not recall considering Wood's borderline mental retardation at all. J.A. 288. Trotter could not recall to what extent or when he might have talked with Dozier and Ralph about the penalty phase presentation "if I spoke to anybody about it." J.A. 277. In an August 1994 letter to an attorney at the Southern Poverty Law Center,

Trotter complained that he did not "have anyone with whom to discuss the case, including the two other attorneys." J.A. 350. This problem was the result of a mitigation effort that was disorganized, lax, and inept. As a result, it is highly probable that counsel's actions did not result from a strategic decision informed by a reasonable investigation of Wood's mental deficiencies, but rather from inattention and neglect.

In addition, the state court's determinations that counsel "testified that they would have used anything in Dr. Kirkland's report that was helpful to them" and "would have presented any information in their possession about Wood's mental health" (Resp. App. 48) are simply irrelevant. What matters is what counsel actually did or did not do, not what they hypothetically *would* have done. The Kirkland Report plainly contained "helpful" mitigation concerning "Wood's mental health." Counsel not only failed to use that information, they also did nothing to investigate it and develop independent sources of evidence about the mental impairments which Dr. Kirkland identified.[19]

In an attempt to buttress counsel's mitigation investigation, the state court and Eleventh Circuit majority noted other activities in which counsel engaged. Pet. App. 39a-40a, 56a-57a. But those activities amounted to little more than interviews with Wood's family members and other attempts to collect general background information on which counsel failed to follow through and which were unsuccessful, as discussed in further detail below. None of that

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[19] Dozier testified that this type of information would be relevant at the penalty phase. J.A. 169

evidence bears on any supposed investigation of Wood's mental impairments revealed by the Kirkland Report, and the state court determination that counsel further investigated those matters based on such evidence is unreasonable and is rebutted by clear and convincing evidence.

The state court found that "Trotter met with Wood's family." Pet. App. 201a. According to Trotter, he met with Wood's family at the courthouse and "that is how [he] identified the witnesses that we used at the penalty phase." J.A. 277. At the Rule 32 hearing, two of Wood's sisters testified that they did not meet Trotter at the courthouse until after Wood had been convicted. (R. Vol. 16, Sept. 18, 2000 Tr. 171; R. Vol. 17, Aug. 22, 2001 Tr. 121.) In any event, none of Wood's family members testified at trial concerning his mental impairments.

Although the state court found that "trial counsel used the services of a private investigator, who prepared reports for use in preparing Wood's defense" (Pet. App. 201a; *see* Pet. App. 56a-57a), it did not find that the investigator was ever asked to develop any information about Wood's mental functioning or that he took any steps to do so. On the contrary, the investigator's contemporaneous notes of his witness interviews, which he confirmed represented the total substance of the interviews, show that he focused solely on guilt/innocence issues—not on potential mitigation evidence. J.A. 361-68.

The state court also found that "[c]ounsel . . . attempted to get information from Wood's schools" and "contacted individuals at Luverne High School" (Pet. App. 201a; *see* Pet. App. 57a), but this "attempt[ ]" was feeble and ineffective. The record shows that, after issuing a subpoena to Luverne High School,

Trotter placed two very brief phone calls to the school, which he reported as consuming between 15 and 20 minutes in total. J.A. 267, 320. But he failed to enforce the subpoena, obtained no school records, and made no effort to contact any of Wood's teachers. J.A. 267.

Similarly, the state court found that "counsel sought information from the Alabama Department of Pardons and Paroles, the Alabama Department of Corrections, and the Department of Human Resources." Pet. App. 201a-02a; *see* Pet. App. 57a. But because counsel neglected to enforce the trial court's discovery order, they obtained no records until the morning of the penalty phase hearing before the jury, when they obtained records from the State Board of Pardons and Paroles. However, the documents did not arrive until after the proceedings had begun (J.A. 13-14), thereby precluding any realistic chance of making any significant use of or conducting further investigations based on information in the documents.

The state court also characterized the record as "silent" on the issue of why trial counsel did not call Dr. Kirkland as a witness. Resp. App. 52. Based on that characterization, the state court indulged a presumption that Wood's trial counsel made a reasonable professional judgment "that calling Dr. Kirkland to testify was not in Wood's best interest." Resp. App. 52. But whether trial counsel made a decision not to call Dr. Kirkland as a witness is beside the point. As set forth above, the Kirkland Report was prepared for the specific purpose of advising the court and the parties whether Wood was competent to stand trial or presented issues warranting a special plea based on his mental state at the time of the crime. It did not contain the type or

amount of information that an investigation of potential mitigation evidence would have produced. Obtaining the Kirkland Report did not excuse counsel from pursuing their obligation to investigate Wood's mental impairments for penalty phase purposes. The potential mitigation evidence referred to in the Report was available from other sources, through whom it could have been presented to the jury.

In sum, as the Eleventh Circuit dissent concluded, the "only reasonable reading of the record" is that trial counsel "realized too late what any reasonably prepared attorney would have known: that evidence of Wood's mental impairments could have served as mitigating evidence and deserved investigation so that it could properly be presented before sentencing." Pet. App. 85a-86a.

III. COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED WOOD

It is well-established that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (citation omitted). In making that inquiry, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *see also Gregg v. Georgia*, 428 U.S. 153, 204 (1976) ("We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision"). "[I]t is only when the jury is given a vehicle for expressing its reasoned moral response to

that evidence in rendering its sentencing decision, that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal quotations omitted).

Wood's trial counsel did not present a complete picture to the sentencing jury, which resulted in an unreliable sentencing determination. Trial counsel failed to present and the jury did not consider the "inherently mitigating" evidence of Wood's significant mental impairments (*Tennard*, 542 U.S. at 287-88), which "is exactly the sort of evidence that garners the most sympathy from jurors." *Smith*, 379 F.3d at 942. The jury never heard the undisputed testimony of three independent psychologists, including two retained by the State, that Wood has an IQ in the 60s, which constitutes significant deficits in intellectual functioning within the definition of mental retardation. Nor did the jury hear the undisputed testimony that Wood's reading, spelling and arithmetic abilities are at elementary school levels, which is "an area that he functions in the mentally retarded range." J.A. 507; *see also* J.A. 443 (on the Wide Range Achievement Test, Wood had "a reading score of sixth grade and a third grade math and a third grade spelling" score). The jury also did not consider the testimony of Wood's special education teachers about his placement in special education classes and his classification as "educable mentally retarded." J.A. 403, 413, 419. Most students functioned at first through third grade levels and Wood functioned in the "middle to low" range of the special education students. J.A. 403, 414.

Evidence of Wood's mental deficiencies was critical information necessary for the jury's consideration of whether death was an appropriate punishment. Indeed, in light of his borderline mental retardation, Wood shares many of the characteristics exhibited by mentally retarded individuals that led this Court to conclude that their "deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Atkins*, 536 U.S. at 318. There is a reasonable probability that evidence of Wood's mental impairments would have changed at least one juror's calculus of his moral culpability because of Wood's "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318.[20]

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[20] The statement Wood made to the court in this case just before his death sentence was formally imposed shows the diminished mental capacity of someone who spent his youth in special education classes held in the school's basement:

> THE COURT: Mr. Wood, do you wish to say anything at this time?
>
> DEFENDANT WOOD: Yeah, I want to say, if I had committed the offense on Salter's testimony as far as what he done told, they believed from what Salter have told them on the statement, all these statements what he made against me. Three statements saying that I killed the Gosha girl—How can they say I killed her? What do they have to say that I killed her? Salter done told all kind of lies, testimony, different things, people in the street. How can they say that I killed her? He done made all kind of lies. He got on the witness stand and said his testimony, all that statement he made wasn't true. He perjured right there on the witness stand from the testimony.

J.A. 89.

As in *Williams*, "the reality that [Wood] was borderline mentally retarded, might well have influenced the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 398 (citations and internal quotations omitted).

But the jury never learned anything about Holly Wood's mental deficits before voting 10 to 2 for the death sentence. Instead they heard personal pleas for mercy from two of his siblings, evidence that "during his childhood his family had experienced difficult times" and that Wood had been drinking at the time of his arrest, and a parole board report remarking that he needed "anger induced, acting out and reality therapy." J.A. 131. In light of that meager presentation, the Alabama Supreme Court "conclude[d] that neither the jury nor the trial judge acted unreasonably by finding that no mitigating circumstances existed in Wood's case." *Id.* Trotter's brief and uninspired presentation[21] did not give the jury a vehicle through which to express its "reasoned *moral* response" and to make a reliable determination that death was the appropriate sentence for Wood in light of all the relevant information bearing on that issue. *Penry v. Johnson*, 532 U.S. at 788 (emphasis in original).

Wood's jury recommended a death sentence by a vote of 10 to 2, which was the minimum required for such a recommendation under Alabama law. ALA. CODE § 13A-5-46. Had trial counsel's presentation been supplemented with the powerful evidence of

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[21] Trotter realized the limits of the mitigation evidence he presented and even acknowledged in his closing statement to the jury that "it may not be enough for you" when "you are weighing these mitigating factors, and these aggravating factors." J.A. 68.

Wood's significant mental impairments, there is a reasonable probability that at least one additional juror would have "struck a different balance" and concluded that the mitigating evidence outweighed the aggravating evidence. *Wiggins*, 539 U.S. at 537. Evidence of mental impairments "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The state court's contrary decision is an unreasonable determination of the facts based on the state court record and an unreasonable application of clearly established federal law. The state court found that the evidence would not have altered the trial court's determination "that the three aggravating circumstances 'far outweigh' the mitigating circumstances" or the jury's death penalty recommendation in light of the "brutal[]" nature of the crime. Resp. App. 55. But the State conceded and the trial court expressly found that there was no evidence that could establish the distinct aggravating circumstance that the crime was "heinous, atrocious and cruel." J.A. 9, 106. Thus, the crime was not so heinous as to foreclose the jury from returning a verdict of life in prison had they been presented with the available evidence of Wood's mental impairments.

Indeed, in *Williams*, the prosecution presented evidence that following the murder of the victim, the defendant "savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to

having strong urges to choke other inmates and to break a fellow prisoner's jaw." *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000). This Court nevertheless found that the defendant was prejudiced by his counsel's failure to uncover powerful mitigation evidence, including that he was "borderline mentally retarded." *Williams*, 529 U.S. at 396; *accord Rompilla*, 545 U.S. at 393 (finding prejudice where counsel failed to present mitigating evidence of the defendant's abusive childhood and mental health issues in a case where defendant had repeatedly stabbed the victim and set him on fire).

The state court also relied on its "finding that Wood is not mentally retarded" as "further support[] [for] the conclusion that there is no reasonable probability that the presentation of evidence concerning his alleged mental retardation would have affected the outcome of the case." Resp. App. 56. That also constitutes an unreasonable application of clearly established federal law, including *Williams*, which makes plain that borderline mental retardation is powerful mitigation evidence and the failure to investigate and present such evidence is prejudicial. *See Williams*, 529 U.S. at 396-98.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit, and grant the petition for a writ of habeas corpus.

Respectfully submitted,

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August 3, 2009

RESPONDENT'S BRIEF

No. 08-9156

In the Supreme Court of the United States

HOLLY WOOD,
Petitioner,
v.
RICHARD ALLEN, Commissioner,
Alabama Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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(CAPITAL CASE)

QUESTIONS PRESENTED

At defense counsel's request, Dr. Karl Kirkland conducted a pre-trial mental health evaluation of Petitioner Holly Wood. In his report, Dr. Kirkland noted that, while Wood was "functioning in the borderline range of intellect," he suffered from no "mental disorder" that prevented him from remembering or understanding the criminality of his alleged offense: fatally shooting his ex-girlfriend. Dr. Kirkland's report also contained details of Wood's 18 other arrests, including Wood's admission that he shot a previous ex-girlfriend in a similar manner, for a similar reason.

Wood's trial team did not seek another mental health evaluation. Nor did they present any such evidence to the penalty phase jury. Wood claims this was ineffective assistance of counsel. The questions presented are:

1. Under 28 U.S.C. § 2254(d)(2), did the Alabama state courts base their rejection of Wood's ineffective assistance claim upon an unreasonable factual determination that Wood's trial counsel consciously chose to end their mental health investigation with the Kirkland Report and not to present any evidence contained within the report to the penalty phase jury?

2. Did the court of appeals err by applying 28 U.S.C. § 2254(e)(1)'s presumption of correctness to the state court's factual findings when Wood's § 2254(d)(2) claim was based solely on the state court record?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents agree with Wood's assessment of the relevant Constitutional and statutory provisions in this case, with one caveat. Pet. 2-3. Because the second question presented requires the Court to address the effect of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on the statutory presumption of correctness granted to state courts' factual findings, Respondents present both the pre-AEDPA (former § 2254(d)) and post-AEDPA (§ 2254(e)) presumption of correctness statutes in the Appendix. *See infra* at 2a-4a. To assist the Court with the first question presented, we also replicate AEDPA's bar to relief, 28 U.S.C. § 2254(d), in the Appendix. *See infra* at 1a.

INTRODUCTION

Holly Wood believed that his ex-girlfriend was dating another man, so he snuck into her home and shot her in the head while she slept.

Five months before Wood's capital murder trial, his trial team received the results of Wood's pre-trial competency evaluation ("the Kirkland Report"). The Kirkland Report revealed that Wood possessed "an IQ in the borderline range of intellect" and read at a "3rd grade level." J.A. 327, 330. The report concluded, however, that Wood's "thinking was goal directed and logical" and his subaverage intellect did not "detract from his ability to appreciate the

criminality" of his conduct. J.A. 330. The report also revealed that Wood had been arrested on 18 previous occasions, had "problems with anger and impulse control," and admitted to shooting his previous ex-girlfriend "after seeing her with another man." J.A. 326-27. Counsel did not seek another evaluation. Instead, they moved to suppress "all psychiatric and psychological evidence" during the guilt and penalty phases. Trial Record Vol. 8 at 375-77.

In his state post-conviction petition, Wood claimed that, after reading the Kirkland Report, reasonable counsel would have investigated and presented mitigating "evidence of Mr. Wood's mental retardation and mental disability." J.A. 235-39. Six state judges unanimously concluded that, as a matter of historical fact, Wood's trial team "determined that nothing in that report merited further investigation" and that "counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest." BIO App. 51. Based on this factual determination, the state courts ruled that counsel acted reasonably under *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court limited certiorari review to two questions, both directed at the factual determination that trial counsel made a "strategic decision" not to continue their pursuit of mental health evidence and not to present such evidence to Wood's penalty-phase jury. Pet. i.; *see* 28 U.S.C. § 2254(d)(2). But in his § 2254(d)(2) argument, Wood pays scant attention to the factual conclusion outlined in the question presented. *See* Blue Br. 35-51. Instead, Wood rebuts the antithetical notion that "counsel conducted *further* investigation into Wood's mental deficiencies

that were raised in the Kirkland Report" (Blue Br. 44, emphasis added)—a notion that Wood twice acknowledges was not the state courts' factual conclusion. *See* Blue Br. 32, 35.

Presumably for that reason, Wood demotes his § 2254(d)(2) argument to secondary status, in favor of a § 2254(d)(1) claim that the state courts unreasonably applied *Strickland* by ruling that counsel reasonably halted their mental health investigation. But that issue is not fairly included in the questions presented. Pet. i. Nor does it have merit for a simple reason: Pursuing a mental-deficiency-based mitigation defense would have opened the door to the devastating rebuttal evidence contained in the Kirkland Report, especially Wood's shooting assault of his previous ex-girlfriend. That is precisely what occurred during Wood's post-conviction proceedings. The court of appeals' decision should be affirmed.

STATEMENT OF THE CASE

I. WOOD'S VOLATILE RELATIONSHIPS

Wood challenges his death sentence for fatally shooting his ex-girlfriend, Ruby Gosha. But Wood's story begins nine years earlier, with the non-fatal shooting of his previous ex-girlfriend, Barbara Siler.

A. The Assault of Barbara Siler and The McClaren Report

Barbara Siler ended her "abusive" relationship with Wood after one argument in which the Sheriff was summoned. J.A. 478-80. Ms. Siler's mother instructed Wood never to return to the Siler home.

J.A. 480. But he did. One night, Wood sent a friend to the Silers' door to coax Barbara outside. J.A. 480-81. When she refused, Wood shot Barbara Siler through a window. J.A. 481. She survived.

In January 1985, Wood pleaded guilty to assaulting Ms. Siler, and he was sentenced to 15 years imprisonment. J.A. 21-22. Five years later, Wood was paroled. Trial Tr. Vol. 8 at 417. While on parole, Wood was arrested for escaping a police officer during a traffic stop. J.A. 393-401.

Pending his escape trial, Wood was examined for competency by Dr. Michael D'Errico. J.A. 579-82. In his final report ("the McClaren Report"), Dr. D'Errico opined that Wood functioned "in the borderline range of general intelligence."[1] J.A. 580-81. Dr. D'Errico also noted, however, that (1) Wood's memory was "fully intact;" (2) his "structure of thought was normal;" and, (3) Wood admitted that he knew "escap[ing] from law enforcement [was] against the law." J.A. 580-81. In summary, Dr. D'Errico determined that Wood's "mental status appear[ed] essentially normal except for the possibility that he function[ed] within the level of borderline intelligence." J.A. 582.

Wood's escape charge was *nol prossed*, and in June 1993, he was again released on parole to live with Ruby Gosha, his new girlfriend and the mother of his child. J.A. 325; Trial Tr. Vol. 6 at 1046.

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[1] Dr. Harry McClaren's name appears on the letterhead of Dr. D'Errico's report. J.A. 579. The parties and lower courts have therefore referred to Dr. D'Errico's findings as the "McClaren Report."

B. The Murder of Ruby Gosha

Wood's relationship with Ms. Gosha soured, and Wood became "very angry" when he discovered that Ms. Gosha was dating another man named "Amp." J.A. 50. Wood tried to stab Ms. Gosha in the heart through an open car window. Trial Tr. Vol. 3 at 420-22, 504. While Ms. Gosha successfully fought off Wood's first attempt on her life, she lost the use of two fingers when her wrist was slit during the struggle. *Id.* at 420.

Wood's second attempt was successful. On the afternoon of September 1, 1993, Wood and his cousin Calvin Salter traveled to the Gosha home. *Id.* at 414, 455-58. An argument ensued, and like Barbara Siler's mother, Ruby Gosha's mother informed Wood "that she wanted him there no more." *Id.* 420, 457. As he left, Wood told Ruby Gosha, "I will get you some day." *Id.* at 420. Later that night, he did.

As Wood and Salter drove around that evening, they spotted Amp's car. *Id.* at 487. Wood asked Salter to follow Amp, and he told Salter that "if he caught [her], Ruby Lois, and Amp together, he was going to kill her." *Id.* at 488. Salter complied, and at Wood's direction, he stopped near the Gosha residence. *Id.* at 488-90. Wood concealed a shotgun in his clothing and walked toward the house alone. *Id.* at 490-94. Wood snuck into the house through an open back door, placed the shotgun to the head of a sleeping Ruby Gosha, and pulled the trigger. *Id.* at 433, 440-41, 494-95. Ms. Gosha died from the blast.

As Wood and Salter sped away, Wood confessed that he had murdered Ms. Gosha and that "he

[knew] the police was coming." *Id.* at 496. So, as Salter drove, Wood tossed shotgun shells out the window, *Id.* at 495-96, and he buried the murder weapon in the woods behind his father's house. *Id.* at 499. During the getaway, Wood bragged, "I shot that bitch in the head, and blowed her brains out, and all she did was wiggle." *Id.* at 495.

II. WOOD'S TRIAL AND THE KIRKLAND REPORT

Wood was charged with the capital offense of intentional murder during a burglary. Ala. Code § 13A-5-40(4). He was appointed a team of three attorneys. Lead counsel, Cary Dozier, had practiced law for more than 20 years, including time as an Assistant Attorney General, a chief deputy District Attorney, and a clerk for a judge on the Alabama Court of Criminal Appeals. J.A. 138. Dozier had prosecuted "probably over a hundred" criminal trials and represented "probably over a thousand" criminal defendants, including two or three capital murderers. J.A. 144. Frank Ralph had practiced law for more than 30 years and had previously defended 50 felony trials. J.A. 189-90. Kenneth Trotter was a recent graduate of Vanderbilt Law School, and Wood's case was his first jury trial. J.A. 259-60. Dozier also hired a private investigator to assist the team. J.A. 151-52.

Dozier requested that Wood be evaluated for mental competency seven months before trial. Trial Record, Vol. 7 at 216-218. As Dozier later testified, one reason for the evaluation was to "get a lead on some possible mitigating evidence." J.A. 150. The request was granted, and Wood was evaluated by Dr. Karl Kirkland. J.A. 323.

As part of his evaluation, Dr. Kirkland reviewed Wood's Department of Corrections file, which contained a recent mental evaluation of Wood ("the Kilby Evaluation"). J.A. 325-27. Like the McClaren Report, the Kilby Evaluation concluded that Wood's IQ was in the "borderline range of intellectual functioning" and that Wood read at a third-grade level. J.A. 327. Dr. Kirkland concurred, finding that Wood "is at least functioning in the borderline range of intellect" and "is still reading on a less than third grade level." J.A. 329-30. Dr. Kirkland went on to explain that "[t]here was not a mental order present that would detract from [Wood's] ability to appreciate the criminality" of shooting Ruby Gosha. J.A. 330. To the contrary, Wood exhibited "a normal thought process," a "concrete reasoning ability," and "[h]is thinking was goal directed and logical." J.A. 327-28.

Wood made several admissions to Dr. Kirkland. Wood admitted that he suffered from "poor anger control" and "felt injurious to others in the past." J.A. 327-28. He admitted shooting Barbara Siler "after seeing her with another man." J.A. 326. He acknowledged that he had never suffered from head injuries or diseases. J.A. 326. He professed to be sober on the day of Ruby Gosha's murder. J.A. 326, 330. Furthermore, Dr. Kirkland's report listed Wood's 18 arrests, including arrests for harassment, disorderly conduct, and theft of property (three times). J.A. 326-27.

Dr. Kirkland completed his report on May 13, 1994. J.A. 323. Trotter's post-trial fee declaration shows that he spoke with Dr. Kirkland three days prior. J.A. 319. Dozier and Ralph's fee declarations

show that both men reviewed a psychological report on May 24, 1994. J.A. 313-15.

Wood's trial team did not seek another mental evaluation. Instead, two months before trial, they filed a motion to "suppress all psychiatric and psychological evidence" and to require the State to proffer "all witnesses and exhibits" it "intend[ed] to employ" in the penalty phase. Trial Record Vol. 8 at 375-77. As Trotter explained at a pre-trial hearing, based on "the report that was done at Taylor Harden [*i.e.* the Kirkland Report]," Wood sought to prevent any "psychological evidence or argument" that he was "prone to violent behavior" from being introduced to the jury in either the guilt or penalty phases. Trial Tr. Vol. 1 at 72-73.

After a four-day trial, Wood was convicted of capital murder. J.A. 8.

III. The Dual Penalty Phase

In Alabama, capital sentencing is bifurcated. Immediately after conviction, a penalty phase trial is held before the same jury, which issues a non-binding "advisory verdict." Ala. Code § 13A-5-46. After the jury renders its recommendation, the presiding judge orders a "pre-sentence investigation report." Ala. Code § 13A-5-47(b). Once the report is finalized, the judge hears final arguments and imposes the sentence based upon evidence presented at trial, at the sentencing hearing, and in the presentence investigation report. Ala. Code §§ 13A-5-47(c-e).

Here, the State proved three aggravating circumstances. First, the jury's guilt phase verdict established that Wood murdered Ms. Gosha during a burglary. Ala. Code § 13A-5-49(4). Second, the State proved that Wood was "under sentence of imprisonment" (serving parole) at the time of the murder. Ala. Code § 13A-5-49(1). Third, the State offered a certified copy of Wood's conviction for assaulting Barbara Siler, a "prior crime of violence." Ala. Code § 13A-5-49(2). The State attempted to call Ms. Siler to provide details of the shooting, but Trotter and Ralph successfully prevented her testimony. J.A. 23-24.

Before presenting Wood's mitigation case, Trotter informed the trial court that "we don't intend to introduce [the Kirkland] report today to the jury." J.A. 12. Based on Dr. Kirkland's finding of "a history of antisocial behavior and problems with anger control," however, Trotter requested "that there be further evaluation done of the defendant, although that won't be admissible to this jury prior to the judge rendering his final verdict." J.A. 12. The court stated that it would "consider that after we finish [the jury phase] today." J.A. 12.

Trotter presented a two-fold mitigation case to the jury. Trotter argued that Wood killed Ms. Gosha in a drunken fit of jealously—not with premeditated malice:

> This wasn't a cold-blooded murder, someone without any alcohol or anything in their system, someone with any other factors. . . .

> [Wood's] reasoning could have been clouded by the different emotions and the alcohol that he was having. The more he drank and the more he thought about Lois. Lois rejecting him. Lois with Amp, not seeing his baby again. It began to work up inside him, festering up inside him, and that's what brought him to do what you have found that he did.

J.A. 69-72. To support the jealousy element, Trotter elicited testimony that Wood heard that Ms. Gosha was dating Amp. J.A. 50. To support the intoxication element, Trotter called a parole board employee to testify that Wood's arrest report listed him as "perceived to have been drinking" at the time of his arrest. J.A. 59.

Trotter also called three members of Wood's family—his father and two sisters—to establish that Wood was beloved and respected, despite his early life being riddled by "one tragedy after another one." J.A. 34. Some examples of the mitigating evidence elicited by Trotter include:

- Wood's father never lived with Wood or his six siblings because his father was married to another woman, J.A. 29;

- Wood's mother died when he was 10 years old, J.A. 29;

- Wood's lone brother was killed in an automobile accident the next year, J.A. 33;

- After his mother's death, Wood and his siblings lived in a house occupied by 16 people, J.A. 29;

- The siblings were eventually evicted and forced to live alone under the care of Wood's 15-year-old sister, J.A. 30-31;

- Wood quit school at age 15 to secure employment to provide for his siblings, J.A. 33-35; and,

- Wood's family looked up to him as a leader and as a loving son and brother, J.A. 26-27, 35-36, 52.

The jury recommended death by a 10-2 vote. J.A. 84.

Counsel did not seek another mental health evaluation before final sentencing. However, Wood's presentence investigation report referred to both the Kirkland and McClaren Reports, and Trotter ensured that both reports were made part of the sentencing record.[2] J.A. 85-86. Using these reports, Trotter argued to the sentencing court that "Holly cannot use abstraction skills much beyond the average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning . . . [and that] would mitigate any aggravating circumstances in this case." J.A. 88.

A week later, the trial court sentenced Wood to death. J.A. 91-108. In its sentencing order, the court

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[2] Under Alabama law, the sentencing judge considers the "[e]vidence submitted in connection with" the presentence report in his weighing process. Ala. Code § 13A-5-47(d).

outlined its consideration of Wood's borderline intellectual functioning as a mitigating circumstance:

> The forensic evaluation report, which was considered by the Court but not presented to the jury during the penalty phase, shows that the defendant is functioning in the borderline range of intellect. The report also indicates that the defendant does not have a mental disorder present that would detract from his ability to appreciate the criminality of his behavior with regard to this specific alleged instant offense.

J.A. 104. After taking "into consideration all of the matters that [were] properly before the Court," the court was "convinced beyond a reasonable doubt that the aggravating circumstances . . . far outweigh[ed] the mitigating circumstances." J.A. 108.

Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Wood's conviction and sentence on direct appeal. J.A. 109, 125. This Court denied certiorari review. J.A. 1.

IV. State Post-Conviction Proceedings

Wood next filed a post-conviction ("Rule 32") petition in the state circuit court. Relevant here, Wood claimed that his trial team rendered ineffective assistance by "failing to develop evidence of Mr. Wood's mental retardation and mental disability" after viewing the Kirkland Report. J.A. 235-39.

Wood was granted two evidentiary hearings, the first of which began six years after his trial.[3] J.A. 1-3. Dozier testified that while Trotter was responsible for presenting the mitigation case (J.A. 139), "all three" team members investigated and prepared motions for the penalty phase. J.A. 139-40, 166. According to Dozier, "[w]e went over the motions with Mr. Trotter, of course, psychological evaluations and things we felt were necessary for the penalty phase." J.A. 140. When asked if he spoke to "any potential witnesses in mitigation," Dozier replied, "I don't recall. I know we had a lot of correspondence with psychologist [*sic*] and so forth. It's been so long." J.A. 140. While Dozier could not specifically recall reading or making the decision whether to use the Kirkland Report due to the six-year time gap (J.A. 168, 171), he was "sure" the team read it before trial. J.A. 174.

Ralph testified that Trotter had spoken to members of Wood's family in preparation for the penalty phase. J.A. 199. Ralph also spoke to Wood's family members, although he could not remember which ones. J.A. 198-200. Regarding the Kirkland Report, Ralph "remember[ed] seeing" it and believed "counsel and [he] sat down and went over [it] and

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[3] This Court released *Atkins v. Virginia*, 536 U.S. 304 (2002), during the appeal from the initial rejection of Wood's Rule 32 petition. Accordingly, the state appellate court remanded Wood's case for a second hearing to determine (1) whether Wood "[was] mentally retarded" and (2) whether counsel "rendered ineffective assistance because they did not develop and present evidence that [Wood was] mentally retarded." J.A. 388-89. Because this appeal involves the resolution of the latter remanded claim, Respondents focus on the state courts' opinions after the remand.

reviewed it." J.A. 210. Both Ralph and Dozier's fee declarations show that each attorney reviewed a psychological report on May 24, 1994, 11 days after Dr. Kirkland completed his report. J.A. 313, 315, 323.

Trotter testified that the senior attorneys "made the decisions and told [him] what to do" (J.A. 279), and that Dozier, who was lead counsel, made the decision not to proceed beyond the Kirkland Report:

> Mr. Dozier had indicated that he had looked at the report and that he didn't think anything in the report really merited—that there was nothing in the report that merited going further. And so at that point, he determined that we didn't need any further evaluators and no further were called.

J.A. 283. Trotter testified that this decision was made "sometime prior to the penalty phase, prior to October of '94" and that "it would have been around the time that we had received Mr. Kirkland's report and sometime thereafter."[4] J.A. 283. While Trotter suggested that another evaluation be conducted between the jury recommendation and judge sentencing phases (J.A. 12, 343-46), he "relied upon Mr. Dozier's opinion of the psychiatry evaluation and upon the opinion of the psychiatric evaluator as to Mr. Wood's mental condition." J.A. 288.

Trotter testified that he "did a lot of the background research and material for the penalty phase." J.A. 279. He talked "to a lot of [Wood's]

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[4] Wood's trial began on October, 17, 1994. J.A. 1.

family members . . . trying to get information about Holly's upbringing, his background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything we could use to humanize Holly." J.A. 277-78. Trotter also called Wood's school seeking "background information about what kind of student he was, what kind of person he'd been at the school." J.A. 267. When school officials "wouldn't talk to [counsel] about the case," Trotter subpoenaed Wood's school records. J.A. 268. But "they didn't respond to the subpoena" either.[5] J.A. 268.

Wood's school teachers testified at the Rule 32 hearing that Wood possessed an IQ in the "low to mid 60's" (J.A. 403, 413) and was placed in "special education" classes. J.A. 402, 413. According to his teachers, Wood was an "average" special education student who was sometimes "lazy," but never failed his classes. J.A. 409-11, 418.

Three psychiatric experts (one for Wood and two for Respondents) testified concerning Wood's alleged mental retardation. Like the three evaluators before them, each post-conviction expert determined that Wood possessed subaverage intellectual functioning (*Atkins'* first requirement) based on grade-school-level academic skills and full-scale IQ scores ranging from 59 to 73.[6] J.A. 441, 449-50, 491-92, 507, 540.

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[5] Wood takes Trotter to task for failing to obtain his school records. Blue Br. 13, 49-50. Yet, Wood's post-conviction counsel and expert similarly failed to secure and present the records. J.A. 451; Pet. App. 25a.

[6] Under Alabama law, a petitioner must establish three elements to be deemed mentally retarded under *Atkins*: (1) "subaverage general intellectual functioning," (2) sufficient

The experts disagreed, however, on Wood's adaptive functioning (*Atkins'* second requirement). The following is a sample of Wood's adaptive skills the experts considered:

- Wood held down numerous jobs between the ages of 15 and 33 (when he murdered Ruby Gosha), including driving a delivery route, operating a forklift, panning, skimming, and stacking lead, and working at a pulp mill and funeral home. J.A. 422, 476-77, 497-98, 539;

- Wood consistently navigated his delivery route and the route to visit family and a girlfriend in Florida. J.A. 465, 475, 498-99;

- Wood was "extremely good with his money" (J.A. 531), as demonstrated by his ability to pay bills, rent hotel rooms, and purchase and maintain automobiles. J.A. 35, 476-78, 512, 531;

- From an early age, Wood was a "very sharp" dresser (J.A. 514), who prided himself on a "neat," "clean" appearance. J.A. 409, 419, 501; and,

- Wood possessed adequate verbal and written communication skills (J.A. 510), including the ability to write personal letters in cursive handwriting. J.A. 481-82.

"impairments in adaptive behavior," and (3) the manifestation of these deficiencies before the age of 18. *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002).

Based on these adaptive abilities, among others, Respondents' experts determined that Wood is not mentally retarded.[7] J.A. 506-07, 540.

The Rule 32 court agreed. Based on Wood's adaptive abilities, the court ruled that Wood is not mentally retarded. BIO App. 14-31. The court also rejected Wood's claim that counsel performed deficiently for failing to further investigate his "mental retardation and mental disabilities" after reading the Kirkland Report:

> On this record, Wood has failed to establish deficient performance with respect to this claim. His counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation. Based on their investigation and the detailed information that they had in their possession, Wood's counsel made a reasonable judgment that another mental evaluation was not necessary. . . . This Court finds that reasonable counsel could have decided against seeking another mental health evaluation, in order to prepare other, more promising, defenses for trial.
>
> Moreover, it appears that Wood's trial counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest. . . .

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[7] The state court rejected Wood's expert's testimony concerning adaptive functioning because it was based upon "highly questionable, if not entirely inaccurate, information." BIO App. 14-15, 18. The court below noted, "Wood has not claimed (and could not show in any event) any error in the Rule 32 court's exclusion of [his expert's] testimony." Pet. App. 14a, n.7.

> Because their decision was based on a thorough review of Dr. Kirkland's report, the failure of Wood's counsel to create a mental retardation issue at his capital murder trial is understandable and reasonable.

BIO App. 51-53. As for *Strickland's* prejudice element, the Rule 32 court found "no reasonable probability that the presentation of evidence concerning Wood's alleged mental retardation" would have altered either the trial court's "finding that the three aggravating circumstances 'far outweigh' the mitigating circumstances" or the jury's advisory verdict. BIO App. 55.

Adopting the Rule 32 court's final order, the Alabama Court of Criminal Appeals affirmed.[8] J.A. 593-94. The Alabama Supreme Court declined certiorari review. J.A. 4.

V. FEDERAL HABEAS PROCEEDINGS

Pursuant to 28 U.S.C. § 2254, Wood filed a habeas petition with the United States District Court for the Middle District of Alabama. J.A. 4. Wood again claimed that he was "mentally retarded" and that his trial team "was ineffective for failing to investigate and present evidence of [his] mental retardation and mental disability" after reading the Kirkland Report. J.A. 611, 621. The district court declined Wood's request for an evidentiary hearing. Pet. App. 103a-109a. The district court likewise

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[8]Because the appellate court adopted the Rule 32 court's order, Respondents refer to the collective decisions of the state courts as the "state courts' decision."

rejected Wood's claim that he is mentally retarded. Pet. App. 118a-123a.

The court granted habeas relief, however, on Wood's ineffective assistance claim. Pet. App. 140a-151a. The court held that Wood's counsel performed deficiently by failing to present evidence of Wood's "borderline range of intellectual functioning" to the penalty phase jury. Pet. App. 148a. Finding that Trotter (personally) neither made "a strategic decision not to pursue or present evidence of mental retardation," nor a "strategic decision not to let the jury at the penalty phase know about [Wood's] mental condition" (Pet. App. 146a-147a), the district court determined that the state court's contrary legal conclusion was based on "an unreasonable determination of the facts." Pet. App. 147a. As for prejudice, the district court held that evidence of Wood's "intellectual functioning, even if it had not been enough to establish that he was mentally retarded," might have affected the jury's advisory verdict. Pet. App. 151a.

A unanimous panel of the Court of Appeals for the Eleventh Circuit rejected Wood's claim that he is mentally retarded. Pet. App. 7a-14a, 73a. Divided, the court of appeals reversed the district court's grant of relief on Wood's ineffective assistance of counsel claim. Pet. App. 14a-72a.

With regard to § 2254(d)(2), the court held that "Wood has wholly failed to show the state courts made an unreasonable determination of the facts." Pet. App. 49a-50a. In support of the state courts' factual findings that counsel chose not to further investigate and present evidence contained in the

Kirkland Report, the court of appeals cited, among other things, (1) Trotter's Rule 32 testimony that "Dozier reviewed Dr. Kirkland's report and decided nothing merited going further" and (2) Trotter "expressly [telling] the trial judge, on the record and on behalf of the trial team, that Dr. Kirkland had evaluated Wood and counsel did not intend to introduce Dr. Kirkland's report to the jury." Pet. App. 49a.

The court of appeals rejected the district court's finding of deficient performance. The court held that a reasonable attorney could have chosen to stop investigating Wood's mental health issues after reading the Kirkland Report. Pet. App. 58a-59a. The court noted that Wood's trial team could have reasonably chosen not to present mental health evidence to the jury because the Kirkland Report "contained information harmful to Wood." Pet. App. 52a. Addressing counsels' inability to recall certain details six years later, the court held that counsel is presumed to act reasonably when the record is silent as to why they reached a particular strategic decision. Pet. App. 50a-55a.

The court of appeals additionally held that Wood could not establish prejudice. Pet. App. 61a-72a. The court opined that confronting the advisory jury with evidence of Wood's impaired intellectual functioning would have actually "tipped the scales even more toward a death sentence" because the jury would have learned, among other things, (1) that Wood had been arrested on 18 previous occasions; (2) that Wood admitted to Dr. Kirkland that he was not drunk at the time of the murder; (3) the reason why Wood actually quit school; and, (4) the details of

Wood's similar attempt to murder Barbara Siler. *Id.* at 64a-68a.

SUMMARY OF THE ARGUMENT

The state courts' determination of the facts is both presumed and actually correct.

1. By its plain language, § 2254(e)(1)'s presumption of correctness for state court factual findings "shall" apply, and the petitioner "shall" have the burden of rebutting it, in every "proceeding instituted by an application for a writ of habeas corpus," not just those where a petitioner introduces new evidence. Wood's theory that § 2254(d)(2) requires a pre-presumption review of the state court record is a veiled attempt to resurrect 28 U.S.C. § 2254(d)(8) (1994 ed.), which Congress buried with AEDPA. Wood's theory also emasculates the presumption in the 90% of habeas proceedings that do not feature evidentiary hearings, a result clearly at odds with Congress' intent to increase deference to state courts.

Sections 2254(e)(1) and 2254(d)(2) work hand-in-hand to govern review of a state court's determination of the facts. The following three-step approach gives effect to the plain language and Congressional intent for both provisions:

> *Step 1*: When pleading a § 2254(d)(2) claim, the habeas petitioner cites the state court's relevant findings of fact and the portions of the state record that allegedly prove that those findings were erroneous.

Step 2: Applying § 2254(e)(1), the district court determines whether the cited portions of the state record provide "clear and convincing evidence" that rebuts the presumption that the state court's determination of the facts is correct.

Step 3: If the presumption survives, the petitioner's § 2254(d)(2) claim fails because a correct determination of the facts is a reasonable determination of the facts. If the presumption is rebutted, the petitioner clears § 2254(d)(2)'s bar to relief if he can also show that (1) the state court's legal conclusion was "based on" the erroneous factual determination and (2) the state court's determination of the facts was not only erroneous, but also objectively "unreasonable."

2. The state courts based their legal conclusion on a reasonable determination of the facts. The courts rejected Wood's *Strickland* claim based on the following factual conclusion: After reviewing the Kirkland Report, Wood's trial team "determined that nothing in that report merited further investigation" and "decided that calling Dr. Kirkland to testify was not in Wood's best interest." BIO App. 51-53. The courts' determination of the facts is backed by (1) Trotter's Rule 32 testimony that Dozier decided to end the mental health investigation with the Kirkland Report; (2) Trotter's pre-sentencing letters that confirm Dozier decided not to seek further evaluations; (3) Trotter's pre-trial motion to prevent any psychological evidence from being admitted in the guilt or penalty phases; and (4) Trotter's penalty-phase statement to the trial court that "we don't

intend to introduce that report today to the jury." J.A. 12.

With one exception, Wood cites record evidence to rebut the notion that counsel *further* investigated Wood's mental health issues after reviewing the Kirkland Report. Blue Br. 35-37, 43-51. But this endeavor is worthless under § 2254(d)(2) because the state court based its legal conclusion on a finding that counsel decided *against* further investigation, a fact that Wood twice acknowledges in his brief. Blue Br. 32, 35. In fact, counsel's decision to end their mental health investigation with the Kirkland Report is the foundation of Wood's § 2254(d)(1) argument that counsel acted unreasonably. Blue Br. 24-34.

The only evidence that Wood cites to rebut the determination that counsel chose to halt their mental health investigation with the Kirkland Report is counsel's inability to remember the details of their decisions six years later. Wood's reliance on faulty memories fails because it conflicts with *Strickland's* presumption of reasonableness when faced with a silent record. Accordingly, Wood fails to rebut § 2254(e)(1)'s presumption of correctness. Because the state courts' determination of the facts is both presumed and demonstrably correct, it cannot be deemed objectively unreasonable under § 2254(d)(2).

3. The Court should not consider Wood's claim that the state court unreasonably applied *Strickland*. 28 U.SC. § 2254(d)(1). That claim is outside the limited questions presented.

It is also meritless. Prior to the state courts' decision, this Court held on three occasions that counsel reasonably halted a particular line of penalty-phase investigation because counsel had "reason to believe" that further investigation would prove either "fruitless" or "harmful" to his client's case. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *see also Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986). After reading the Kirkland Report, Wood's trial team had reason to believe both. Counsel had reason to believe that continuing to investigate Wood's borderline intellectual functioning was "fruitless" because the Kirkland Report (1) stated that Wood's subaverage intellect did not prevent Wood from understanding the criminality of shooting Ruby Gosha, (2) stated that Wood possessed "concrete reasoning ability" and "goal directed and logical" thought, and (3) contained two virtually identical conclusions regarding Wood's intellectual functioning (obviating the need for a third opinion). J.A. 327-28. The Kirkland Report also contained several pieces of "harmful" information, such as (1) Wood's 18 prior arrests, (2) his admission to anger-control issues, and (3) his admission to shooting his previous ex-girlfriend, Barbara Siler, after seeing her with another man.

These issues are similar to the ones faced by counsel in *Strickland*, *Burger*, and *Darden*, and the Court held in each of those cases that counsel acted reasonably when they chose not to further pursue or present similar lines of mitigation defense. The state courts cannot have unreasonably applied *Strickland* when, faced with a similar set of facts, they reached

the same conclusion as this Court in *Strickland* and two other cases. 28 U.S.C. § 2254(d)(1).

4. Wood cannot establish prejudice for two reasons. First, Alabama is a judge-sentencing state, and Wood's post-conviction evidence of subaverage intellect would not have affected the trial court's weighing analysis. At trial, the court considered Wood's borderline intellectual functioning from three sources: the McClaren Report, the Kirkland Report, and the Kilby Evaluation. After considering this evidence, the court determined that the aggravating circumstances "far outweigh[ed]" the mitigating circumstances. J.A. 108. Presenting similar evidence from new sources would not have altered the trial court's weighing calculus in Wood's favor.

Second, presenting evidence of Wood's mental deficiencies to the advisory jury would have further tipped its sentencing scale in favor of death. At best, Wood's subaverage intellect would have added a feather's weight in mitigation after the jury learned that Wood's low IQ in no way affected his ability to think logically or to know right from wrong. Then, any mitigating weight would have been overwhelmed by the State's rebuttal evidence, including (1) Wood's admitted anger control issues; (2) Wood's acknowledgment that he was sober when he murdered Ruby Gosha; and (3) Wood's admission that he shot Barbara Siler for the same reason he murdered Ruby Gosha—both women had the audacity to date another man.

ARGUMENT

Wood's post-conviction presentation proved that investigating and presenting "evidence of Mr. Wood's mental retardation and mental disability" to a jury was a fool's errand. J.A. 235-39 (Wood's Rule 32 petition); J.A. 621-23 (Wood's § 2254 habeas petition). Wood is not mentally retarded. Nor does his subaverage intellect furnish mitigating weight. And whatever consideration a juror might have given Wood's subaverage intellect would have been eviscerated after Barbara Siler revealed Wood's date-me-or-die attitude toward his ex-girlfriends in rebuttal. J.A. 473-82.

This outcome would not have surprised trial counsel or anyone who read the Kirkland Report. The Kirkland Report not only revealed Wood's low IQ and grade-school-level academic skills (J.A. 327), it also identified the reasons why a juror would give this evidence little to no mitigating weight: Wood possessed "concrete reasoning ability" (J.A. 327-28); his thinking was "goal directed and logical," (J.A. 327); and he could "appreciate the criminality of [his] behavior" (J.A. 330). This supposition proved correct. Wood's sentencing judge gave no weight to Wood's borderline intellectual functioning because it did not "detract from his ability to appreciate the criminality" of shooting Ruby Gosha. J.A. 104. When post-conviction counsel tried to expand on the Kirkland Report, they failed to present any evidence that Wood's subaverage intellect affected his judgment, and 10 out of 10 judges agreed that Wood is not mentally retarded.

The Kirkland Report also forecast the State's rebuttal strategy: hammer home Wood's criminal history and anger-control issues, especially the fact that Wood shot Barbara Siler because—like Ruby Gosha—she "had the audacity to date another man."[9] Pet. App. 67a. Again, this supposition proved correct. At trial, the prosecutor attempted to elicit Barbara Siler's testimony, only to be repelled by Wood's trial team. J.A. 23-24. But when post-conviction counsel employed a mental-deficiency-based strategy at the Rule 32 hearing, they opened the door for Barbara Siler's story (J.A. 473-82) and the details of Wood's arrest for criminal impersonation and escape from police. J.A. 393-401.

That the Kirkland Report foretold the negative results of a mental-deficiency-based strategy drives the resolution of Wood's § 2254(d) claims in favor of the state courts' decision. As for Wood's § 2254(d)(2) claim, it sheds light on the reasons why, as a matter of historical fact, Wood's trial team halted their mental health investigation and fought to suppress all psychological evidence. *See infra* at 37-47.

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[9] By statute, Ala. Code § 13A-5-45(g), "the State is allowed to rebut any evidence the [defendant] offers as a mitigating circumstance." *George v. State*, 717 So. 2d 849, 852 (Ala. Crim. App. 1997) (holding that evidence that defendant fled the state is admissible to rebut mitigating evidence of "extreme mental or emotional disturbance); *see also Ex parte Smith*, No. 1010267, 2003 WL 1145475 (Ala. 2003) (citing evidence of defendant's "interstate illegal drug enterprise" to rebut mental retardation); *Smith v. State*, __ So. 2d __, 2007 WL 2459291 (Ala. Crim. App. Aug. 31, 2007) (ruling that evidence of defendant's "arrest[] for carrying a concealed weapon and for contributing to the delinquency of a minor" was admissible to rebut claim of mental retardation).

Regarding § 2254(d)(1), it shows why Wood's team acted reasonably under *Strickland*. *See infra* at 47-54. Furthermore, the negative ramifications of Wood's post-conviction strategy defeat Wood's prejudice argument. *See infra* at 55-63.

To set the table for these merits arguments, Respondents begin by explaining how the Court should reach its § 2254(d)(2) conclusion procedurally under AEDPA. To do so, we answer the questions left open in *Rice v. Collins*, 546 U.S. 333, 339 (2006): (1) Does § 2254(e)(1)'s presumption of correctness for state court factual findings apply when the district court's review is confined to the state court record and, if it does, (2) how does § 2254(e)(1) interact with § 2254(d)(2)?

I. SECTION 2254(e)(1)'S PRESUMPTION OF CORRECTNESS APPLIES IN ALL § 2254 HABEAS ACTIONS.

Under AEDPA, the presumption of correctness for state court factual findings is unconditional. 28 U.S.C. § 2254(e)(1). It "shall" apply in every § 2254 habeas proceeding, *id.*, including those involving a review of the state court record under §2254(d)(2). The Court has agreed on multiple occasions:

- *Wiggins v. Smith*, 539 U.S. 510, 528 (2003): "The state court's assumption that the records documented instances of this abuse has been shown to be incorrect by 'clear and convincing evidence,' 28 U.S.C. § 2254(e)(1), and reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' § 2254(d)(2)."

- *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005): "Under [AEDPA], Miller-El may obtain relief only by showing the Texas conclusion to be 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the 'presumption of correctness by clear and convincing evidence.' § 2254(e)(1)."

- *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007): "Under AEDPA, Congress prohibited federal courts from granting habeas relief unless . . . the relevant state-court decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' § 2254(d)(2). . . . AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.' § 2254(e)(1)."

Wood disagrees. Relying on the Ninth Circuit's opinion in *Taylor v. Maddox*, 366 F.3d 922 (9th Cir. 2004), he argues that § 2254(e)(1) only applies when a petitioner attacks the state courts' factual findings "based in part on evidence extrinsic to the state court record." Blue Br. 38-39. According to Wood, "[t]he additional requirements of § 2254(e)(1) do not apply" when a habeas petitioner "seeks relief based entirely on the state court record." Blue Br. 38. Wood's interpretation of § 2254(e)(1) not only contradicts this Court's prior pronouncements, it ignores the plain language, history, and intent of AEDPA.

A. Under its Plain Language, § 2254(e)(1) Applies in all § 2254 Habeas Proceedings.

The debate whether § 2254(e)(1)'s presumption applies to all proceedings initiated under § 2254(d) ends with its very first sentence:

> *In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court*, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1) (emphasis added). In no uncertain terms, Congress stated that the presumption "shall" apply, and the petitioner "shall" have the burden of rebutting it, in all proceedings "instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment," not just those proceedings featuring extrinsic evidence. *Id.*

Had Congress intended to limit the presumption to cases involving extrinsic evidence, it would have said so. But Congress did not. Congress stated that the presumption applies in *all* proceedings in which a § 2254 habeas petition is filed, and that should be the end of the matter. *See Zuni Public School Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 93 (2007) ("[I]f the intent of Congress is clear and

unambiguously expressed by the statutory language at issue, that would be the end of our analysis.").

B. AEDPA Eliminated Pre-Presumption Review Of The State Court Record.

Section 2254(e)(1)'s history provides further proof that Congress intended the presumption to apply immediately upon the filing of a § 2254 petition. Congress did not create § 2254(e)(1) from whole cloth in 1996. For 30 years, the federal habeas statute included a pre-presumption review of the state court record much like Wood's reading of current § 2254(e)(1). *See* 28 U.S.C. § 2254(d)(8) (1994 ed.). But Congress abolished that threshold review with AEDPA.

1. Before AEDPA, the statutory presumption of correctness lay in 28 U.S.C. § 2254(d) (1994 ed.). Respondents reproduce the defunct statute, in its entirety, in the Appendix. *See infra* at 2a-3a. Former § 2254(d) applied a three-step approach to the presumption. *See generally* Wright, Miller, Cooper, and Amar, *Federal Practice and Procedure*, Jurisdiction 3d § 4265.1 at 339-51. First, the State had the burden of establishing three prerequisites: (1) the relevant issue was determined by a state court with competent jurisdiction; (2) the state court conducted a hearing on the merits; and, (3) the factual findings were reduced to writing. *Id.* at 339-40.

If these prerequisites were met, the second step allowed a petitioner to avoid the presumption in one of eight enumerated ways. *Id.* at 340-47. The eighth, former § 2254(d)(8), allowed the petitioner to

avoid the presumption if the state court's "factual determination [was] not fairly supported by the record." Thus, under § 2254(d)(8), the district court could review the state court's factual findings against the state court record before applying the presumption of correctness. *See, e.g.*, *Wainwright v. Goode*, 464 U.S. 78, 84-85 (1983) (applying former § 2254(d)(8)'s "fairly supported by the record" standard); *Marshall v. Lonberger*, 459 U.S. 422, 430-38 (1983) (same).

If the petitioner failed to meet one of the eight circumstances listed in § 2254(d), then, and only then, the presumption of correctness attached. Wright & Miller, *supra* § 4265.1 at 348. At that point (step three), a petitioner could overcome the presumption "in an evidentiary hearing in the proceeding in the Federal Court" by "establish[ing] by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d) (1994 ed.).

Wood's theory of a threshold, pre-presumption review of the state court record resembles habeas law from 1966 to 1996; specifically, former § 2254(d)(8). But Wood's case is not governed by the 1966 habeas statute. It is governed by AEDPA.

2. With AEDPA, the presumption statute was "relettered as § 2254(e)(1), but drastically changed in substance." Wright & Miller, *supra* § 4265.2 at 354. Congress modified or extracted three significant sections from former § 2254(d). First, Congress removed the three prerequisites for the State to claim the presumption. Second, Congress erased the eight avenues to avoid the presumption, including

former § 2254(d)(8)'s pre-presumption review of the state court record. Third, Congress changed the petitioner's rebuttal burden from "convincing evidence" to "clear and convincing evidence," while also removing the introductory clause that indicated the burden must be rebutted "in an evidentiary hearing in the proceeding in the Federal court."

These changes were not merely cosmetic. Congress manifested its intent to strengthen the deference afforded to state court decisions throughout AEDPA. *See, e.g.*, 28 U.S.C. §§ 2244(b) (tightening restrictions on successive petitions); 2244(d) (creating a one-year statute of limitation); 2254(b) (strengthening "exhaustion" defenses); 2254(d) (erecting deferential bars to habeas relief); 2254(e)(2) (minimizing evidentiary hearings). With § 2254(e)(1), Congress strengthened the statutory presumption of correctness for state court factual findings by eliminating the strings attached.

3. Wood wants to keep the strings. The notion that "the presumption of correctness and the clear-and-convincing standard of proof only come into play once the state court's fact-findings survive any intrinsic challenge," *Taylor*, 366 F.3d at 1000, is a veiled attempt to resurrect former § 2254(d)(8). But treating § 2254(d)(2) as the re-incarnation of former § 2254(d)(8) not only defies AEDPA's plain language and Congressional intent, it could render § 2254(e)(1) meaningless in 90% of § 2254 habeas proceedings.

Wood argues that § 2254(e)(1) does not apply "where a habeas petitioner seeks relief based entirely on the state record." Blue Br. 38. A recent study of post-AEDPA habeas proceedings suggests that,

nationwide, 90.5% of capital cases and 99.6% of non-capital § 2254 cases proceed without an evidentiary hearing. Nancy J. King, *et. al*, *Final Technical Report: Habeas Litigation in U.S. District Courts*, 35-36, 64 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. So, under Wood's theory, § 2254(e)(1) would apply in less than 10% of habeas proceedings.

Not only is this outcome wrong, it emasculates the presumption in the wrong set of cases. According to Wood, § 2254(e)(1) would not apply in cases in which federal evidentiary hearings are foreclosed, a result that generally occurs because the petitioner received a full and fair hearing in the state court. The presumption would apply when evidentiary hearings are conducted, which generally occurs because the state court did not hear all of the facts (due to no fault of the petitioner). *See* 28 U.S.C. § 2254(e)(2). Thus, under Wood's theory, deference is bestowed upon state court factual findings that were based on less than all of the facts, and deference is withheld when the state courts heard everything.

The Court has already rejected one theory that emasculated § 2254(e)(1)'s presumption in a large number of habeas proceedings. *See Woodford v. Garceau*, 538 U.S. 202, 207-08 (2003) (rejecting the Ninth Circuit's view that a habeas proceeding is initiated "with the filing of a request for the appointment of counsel or a motion for a stay"). The Court should rule likewise here.

C. SECTIONS 2254(d)(2) AND 2254(e)(1) WORK TOGETHER IN A PRINCIPLED MANNER.

Every circuit save one agrees with Respondents: § 2254(e)(1) applies in habeas proceedings involving a review of the state court record. *See* Brian R. Means, *Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation* § 3:83 (2009) (collecting the circuits' decisions on the issue).[10] The quandary has been *how* to apply both § 2254(e)(1) and § 2254(d)(2) in the same proceeding. *See id.*

Two steps of logic suggest that §2254(e)(1) applies first and §2254(d)(2) second. First, state courts' factual findings are presumed correct until proved otherwise. 28 U.S.C. § 2254(e)(1). Second, a correct factual determination is necessarily a reasonable factual determination. Applying these principles, a petitioner cannot prove that a state court's decision was "based on an unreasonable determination of the facts" under § 2254(d)(2) until he first destroys the presumption that the court's "determination of the facts" are correct under § 2254(e)(1).

With this in mind, Respondents offer a step-by-step guide to reviewing claims in which the

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[10] The minority circuit, the Ninth, has been somewhat inconsistent on its position. *Compare Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004) (holding that § 2254(e)(1) does not apply when reviewing the state court record) *with Williams v. Warden*, 422 F.3d 1006, 1009 (9th Cir. 2005) (applying § 2254(e)(1)'s presumption of correctness to a state court factual determination regarding the meaning of jury verdict forms).

petitioner relies solely on the state court record to attack the state court's determination of the facts.[11]

> *Step 1 (Pleading):* A petition is filed, bathing the state court's factual findings in a presumption of correctness. The petitioner claims that he can overcome § 2254(d)(2)'s bar to relief and identifies (1) the state court's factual findings that formed the basis of its legal conclusion and (2) the record citations that prove the state court erred.
>
> *Step 2 (§ 2254(e)(1)):* The district court determines whether the cited portions of the state record prove, by "clear and convincing evidence," that the state court's factual findings are erroneous.
>
> *Step 3 (§ 2254(d)(2)):* If the presumption survives Step 2, then the petitioner cannot overcome § 2254(d)(2)'s bar to relief because a correct determination of the facts constitutes a reasonable determination of the facts. If the presumption is rebutted, however, the petitioner can overcome § 2254(d)(2)'s bar if he can also show that (1) the state court's legal decision was "based on" the erroneous factual determinations and (2) the state court's

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[11] Because it is not presented here, Respondents do not address the question left open in *Holland v. Jackson*, 542 U.S. 649, 652 (2004): How do § 2254(d)'s bars apply when a petitioner presents evidence in federal court that was not considered by the state courts?

determination of the facts was not only erroneous, but also objectively unreasonable.[12]

Unlike Wood's theory, this proposed application gives effect to the plain language of §§ 2254(d)(2) and 2254(e)(1). It also mirrors the Court's treatment of the distinct provisions in *Wiggins* when the Court determined that a habeas petitioner had overcome § 2254(d)(2)'s bar to relief. 539 U.S. at 528. Below, we put our proposal into practice.

II. WOOD CANNOT OVERCOME § 2254(d)(2)'S BAR TO HABEAS RELIEF.

To clear § 2254(d)(2)'s bar, a petitioner must show that the state court's legal decision "was *based on* an unreasonable determination of the facts." (Emphasis added.) Because Wood violates the "based on" requirement by attacking one line of the state courts' recitation of testimony, instead of its ultimate determination of the facts, *see infra* at 40-44, we begin by detailing the state courts' decision.

Under *Strickland's* deficient performance element, the state courts concluded that, after reading the Kirkland Report, Wood's trial team reasonably chose not to investigate further Wood's

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[12] In rare cases, Respondents believe that a state court's finding of fact can be proved erroneous by clear and convincing evidence under § 2254(e)(1), yet still be objectively reasonable under § 2254(d)(2). *See generally Lockyear v. Andrade*, 538 U.S. 63, 75 (2003) ("The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."). But further discussion of the issue is unnecessary in this case because Wood failed to rebut the presumption of correctness by "clear and convincing evidence" in Step 2. *See infra* at 37-47.

mental health and not to "create a mental retardation issue" in the penalty phase. BIO App. 51-53. This legal conclusion was based on the following determination of the facts:

> [Wood's] counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation. Based on their investigation and the detailed information that they had in their possession, Wood's counsel made a reasonable judgment that another mental evaluation was not necessary. . . .
>
> Moreover, it appears that Wood's trial counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest.

BIO App. 51-52. Before we explain Wood's error, Respondents show that the state court record, and the inferences arising from the facts therein, strongly support the presumption that the state courts' determination of the facts is correct. *See Parke v. Railey*, 506 U.S. 20, 35 (1992) (stating that the state courts' findings of historical fact, and the "inferences properly drawn from such facts," are statutorily presumed correct); *Lonberger*, 459 U.S. at 431-32 (same).

A. THE STATE COURTS CORRECTLY DETERMINED THE FACTS.

Wood does not challenge the finding that counsel "reviewed Dr. Kirkland's Report." BIO App. 51. Nor can he. Both Dozier and Ralph testified that they did. J.A. 174, 210. Both men's fee declarations

show that each reviewed a psychological report 11 days after the Kirkland Report was finished. J.A. 323. Furthermore, Trotter testified at the Rule 32 hearing that Dozier reviewed the report (J.A. 283), and Trotter recited findings from the report to the trial court before the penalty phase. J.A. 12.

That counsel (specifically lead counsel, Dozier) determined "nothing in that report merited further investigation" (BIO App. 51), is backed by Trotter's Rule 32 testimony:

> Mr. Dozier had indicated that he had looked at the report and that he didn't think anything in the report really merited—that there was nothing in the report that merited going further. And so at that point, he determined that we didn't need any further evaluators and no further were called.

J.A. 283. Trotter's recollection is backed by a statement in his November 1994 letters to senior counsel: "We have not had any independent psychological evaluations done since [Dozier] said it would not be needed." J.A. 343, 345.

That Wood's trial team consciously chose not to present Dr. Kirkland, or any mental health evidence contained in his report, to the jury is proved by two facts. First, counsel filed a pre-trial motion to "suppress all psychiatric and psychological evidence" in the guilt and penalty phases. Trial Record Vol. 8 at 375-77. As Trotter explained before trial, counsel sought to prevent the jury from hearing any "psychological evidence or argument" that Wood was "prone to violent behavior." Trial Tr. Vol. 1 at 72-73.

Trotter was likely referring to the finding that Wood had "problems with anger and impulse control;" Wood's admission to Dr. Kirkland that he "has felt injurious toward others in the past;" and, Wood's admission to shooting Barbara Siler out of jealousy. J.A. 327-28. Second, referring to the Kirkland Report, Trotter told the court immediately before the penalty phase, "we don't intend to introduce that report today to the jury." J.A. 12. "Inten[t]" springs from a conscious decision; in this case, the decision not to present the Kirkland Report to the jury.

Reasonable inferences from the record establish why counsel likely made these decisions. Counsel likely determined that Wood's below-average IQ and reading skills would not have moved the jury because, as Dr. Kirkland explained in his report, (1) Wood possessed no mental deficiencies that prevented him knowing that shooting Ruby Gosha was wrong; (2) Wood possessed "concrete reasoning ability;" and, (3) Wood's "thinking was goal directed and logical." J.A. 327-28. Furthermore, the cost of any benefit was steep. Had the report been introduced, the jury would have learned of Wood's 18 prior arrests. J.A. 326-27. The jury would have learned that Wood suffered from impulse and anger control issues. J.A. 327-28. Finally, the jury would have learned that Wood admitted to shooting Barbara Siler for the same reason he shot Ruby Gosha: Both women "had the audacity to date another man." Pet. App. 67a.

B. Wood Rebuts a Straw Man.

Wood's § 2254(d)(2) argument fails largely because, with one exception explained *infra* at 44-46,

Wood attempts to rebut a factual conclusion the state courts never reached.

1. Wood initially gets it right. In his "Statement of the Case," Wood correctly identifies the state courts' decision: "The court found that Wood had 'failed to establish deficient performance,' concluding that 'counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation.'" Blue Br. 17. Then, as his primary argument, Wood claims that he clears § 2254(d)(1)'s bar because the state courts unreasonably applied *Strickland* when they concluded that counsel reasonably halted their mental health investigation with the Kirkland Report. Blue Br. 24-34. Wood's position then turns. Wood claims that he clears § 2254(d)(2)'s bar because the state courts unreasonably determined, as a matter of historical fact, that counsel *continued* investigating Wood's mental health issues after reading the Kirkland Report. Blue Br. 35-51.

Petitioner's about-face is predicated on the following exchange from Dozier's Rule 32 testimony:

> Q: Did that [Kirkland] report provide anything for you at all?
> A: I think it indicated that Holly Wood had some problems at a younger age or something like that. I just don't recall all this. I think there was some childhood problems, something in the report.
> Q: So anything in the report, would you have pursued that in the penalty phase?
> A: Oh, we did. We did.

J.A. 150. During its recitation of counsel's testimonies, the Rule 32 court characterized Dozier's answer thusly: "[h]e affirmed that they diligently pursued the information that was contained within Dr. Kirkland's report."[13] BIO App. 48.

Twice, Wood correctly recognizes that this statement was the Rule 32 court's "characterization of Dozier's testimony," and that it should not be "misconstrued as the state court's conclusion." Blue Br. 32, 35. Yet, Wood makes that mistake by labeling the court's characterization of Dozier's testimony as its "ultimate fact determination" (Blue Br. 36) and then making it the foundation of his § 2254(d)(2) claim: "[T]he state court's decision that trial counsel conducted a diligent investigation of Wood's mental deficiencies raised in the Kirkland Report is objectively unreasonable based on the totality of the evidence in the state court record." *Id.*; *see also* Blue Br. 43-44 ("the ultimate determination that Wood's trial team adequately investigated the crucial evidence revealed in the Kirkland Report is an objectively unreasonable determination of the facts"), 48-49 ("the state court determination that counsel further investigated those matters based on such evidence [*i.e.* interviewing family members and collecting "general background information"] is unreasonable and is rebutted by clear and convincing evidence").

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[13] This recitation occurs three pages before the court declares its ultimate factual and legal findings. *Compare* BIO App. 44-50 (recitation of Dr. Kirkland's findings and counsel's post-conviction testimonies) *with* 51-53 (ultimate findings).

But, as previously outlined, the state courts' factual conclusion was that "counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation." BIO App 51. And, again, Wood embraces the courts' factual conclusion as the linchpin of his § 2254(d)(1) claim: "The state court did not make *any* findings of historical fact that counsel took any action, went anywhere, or spoke to anyone in an effort to follow up on that information [revealed in the Kirkland Report]." Blue Br. 32.

Wood therefore argues in vain. Because the state courts' characterization of Dozier's answer did not form the factual basis of the courts' legal conclusion, it is worthless under § 2254(d)(2).

Wood's mistake turns his argument in Respondents' favor. To prove that counsel halted their mental health investigation with the Kirkland Report, Wood relies upon Trotter's suggestions that another mental health evaluation be performed; first in statements to the trial court before the penalty phase (J.A. 12) and then in letters to senior counsel after the jury rendered its advisory verdict (J.A. 343, 345). Blue Br. 44-45. But, as we outlined in the previous section, these pieces of evidence prove the correctness of the state courts' factual determination. Trotter's statement to the trial court that "we don't intend to introduce that report today to the jury" (J.A. 12) bolsters the factual finding that counsel decided that "calling Dr. Kirkland to testify was not in Wood's best interest." BIO App. 51-52. Trotter's statement to the court that "no further investigation has been done, psychologically, of those points [raised in the Kirkland Report]" (J.A. 12), supports

the factual finding that counsel "determined that nothing in that report merited further investigation." BIO App. 51. The same finding of fact is bolstered by Trotter's letters to senior counsel, which state, "We have not had any independent psychological evaluations done since [Dozier] said it would not be needed." J.A. 343, 345.

At best, Wood's cited evidence suggests that, while Trotter "relied upon Mr. Dozier's opinion of the psychiatry evaluation" (J.A. 288), Trotter disagreed with Dozier's decision to not to seek another mental health evaluation. But that is not the issue. Under §§ 2254(e)(1) and 2254(d)(2)—and the first question presented (Pet. i.)—the issue is whether the state courts rightly determined, as a matter of historical fact, that the decision to forgo further investigation was made. On that issue, Wood's primary evidence supports the presumption of correctness.[14]

2. Consciously or not, while chastising the court of appeals' decision, Wood momentarily veers into a rebuttal of the factual determination that counsel chose to halt their mental health investigation with the Kirkland Report. Blue Br. 46-47.[15] Wood notes that (1) "Dozier could not recall making the supposed

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[14] Both of Trotter's calls for a post-jury mental evaluation were based on evidence that Wood suffered from "antisocial behavior" and "anger control" issues, not borderline intellectual functioning. J.A. 12, 343, 345. Trotter fought to prevent the jury from discovering and considering the same anger control issues. Trial Record Vol. 1 at 72-73; Vol. 8 at 375-77. Thus, Trotter's calls for a post-jury evaluation cannot be construed as Trotter's opinion that Wood's borderline intellectual functioning warranted further investigation or presentation to the jury.

[15] Wood resumes his attack on the state courts' recitation of Dozier's testimony on page 48.

decision attributed to him [by Trotter]," and (2) "Trotter, who had no relevant experience, did not recall considering Wood's borderline mental retardation at all." Blue Br. 46-47 (*citing* J.A. 168, 171, 288). But these memory lapses do not prove that counsel failed to take certain actions; they prove that counsel are human.

By the time they testified at the Rule 32 hearing, six years had passed since trial for Dozier and Ralph, seven years for Trotter. J.A. 1-2. Among them, Wood's three attorneys testified that they could not "recall" or "remember" specific details about the trial more than 100 times. J.A. 137-212, 255-311. These memory lapses reached far beyond the Kirkland Report. For example, Dozier forgot Trotter's first name, but he obviously has one (Kenneth). J.A. 138-39. Similarly, Dozier could not recall whether the murder weapon had been forensically tested (J.A. 156), but it clearly was. J.A. 114-15. And, relevant here, Dozier could not recall making the decision to forgo another mental health evaluation (J.A. 171), but we know that he did because Trotter said so in his November 1994 letters (J.A. 343, 345), and during his testimony at the August 2001 evidentiary hearing. J.A. 283.

Strickland accounts for silent records by bestowing a presumption of reasonableness upon counsel that "the defendant must overcome." *See Strickland*, 466 U.S. at 689. The Court should reject Wood's call to turn the presumption on its head. Post-conviction delay is already a capital prisoner's best friend. As charted *infra* at 5a, Alabama's death row inmates have stretched the length of time between trial and their Rule 32 evidentiary hearings

up to 16 years with petitions ranging from 50 to 370 pages. If the Court holds that delay-induced amnesia constitutes "clear and convincing evidence" that an action was not taken, it will incentivize even greater delays in capital habeas proceedings—a result diametrically opposed to "AEDPA's acknowledged purpose of reducing delays in the execution of state and federal criminal sentences." *Landrigan*, 550 U.S. at 475.

C. Because It Is Presumed Correct, The State Courts' Factual Determination Is Objectively Reasonable.

Because Wood fails to rebut § 2254(e)(1)'s presumption of correctness with clear and convincing evidence, his § 2254(d)(2) argument is easily dispatched. The state courts' determination of the facts is presumed correct, so it cannot be objectively unreasonable. As a result, Wood cannot clear § 2254(d)(2)'s bar to relief.

The same result occurs even if § 2254(e)(1)'s presumption has no application here. Under § 2254(d)(2), disagreement with the state courts' factual determination is not enough. A petitioner must show "that the trial court had no permissible alternative but to" reach the opposite conclusion. *Rice*, 546 U.S. at 341-42. Wood cannot meet this standard. Even if it is debatable, it is at the very least "permissible," and thus objectively reasonable, to factually conclude that, after reviewing the Kirkland Report, counsel "determined that nothing in that report merit further investigation" and that "calling Dr. Kirkland to testify was not in Wood's best interest." BIO 51-53. That determination is

permissible because it is based on (1) counsels' fee declarations, (2) their pre-trial motion to suppress all psychological evidence, (3) Trotter's pre-penalty phase statements to the trial court, (4) Trotter's subsequent letters to senior counsel, and (5) the attorneys' post-conviction testimonies.

III. WOOD CANNOT OVERCOME § 2254(d)(1)'S BAR TO HABEAS RELIEF.

Assuming that the state courts' factual findings are correct, Wood argues that he clears § 2254(d)(1)'s bar to relief because the state courts unreasonably applied *Strickland*'s deficient performance standard to those facts. Blue Br. 24-34. This argument is both meritless and outside the limited questions presented.

A. WOOD'S § 2254(d)(1) CLAIM IS NOT FAIRLY INCLUDED WITHIN THE LIMITED QUESTIONS PRESENTED.

Wood has pulled a bait-and-switch. At the cert-stage, Wood pitched this case as an opportunity to resolve the "conflict among the circuits regarding the interaction of Sections 2254(d)(2) and 2254(e)(1);" *i.e.* the question left unanswered in *Rice v. Collins*. Pet. 13; *see also* Pet. Reply 2 (same). He crafted two questions around his § 2254(d)(2) claim—the first addressing its merits, the second addressing § 2254(e)(1)'s application to his claim. Pet. i. The Court granted review, limited to those two questions. J.A. 635. But now that review has been granted, Wood relegates discussion of § 2254(d)(2) to in-the-alternative status, in favor of a distinct § 2254(d)(1) claim. Blue Br. 24-51.

Only questions "fairly included" within those set out in the petition "will be considered by the Court." Rule 14.1(a), Rules of the Supreme Court of the United States. As the Court noted in *Rice*, "[t]he question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." 546 U.S. at 342. Consequently, Wood's claim that the state courts unreasonably applied *Strickland* should not be considered under Rule 14.1(a) because it is a different question than the one upon which cert was granted: "Whether [the] state court's decision on post-conviction review is based on an unreasonable determination of the facts." Pet. i.

Granted, Wood discussed § 2254(d)(1) in the body of his petition. Pet. 22-25. But "the fact that [Wood] discussed this issue in the text of [his] petition for certiorari does not bring it before [the Court]. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993). Rule 14.1(a) levies the requirement that all distinct issues be spelled out in the questions presented, in part, so that "parties who feared an inability to prevail on the question presented would [not] be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted." *Yee v. Escondido*, 503 U.S. 519, 536 (1992). With Wood now demoting his § 2254(d)(2) claim to secondary status, and attacking a characterization of testimony rather than the factual conclusion outlined in the questions presented, *see infra* at 40-44, this appears to be one of those cases.

B. Like Counsel in *Strickland*, *Darden*, and *Burger*, Wood's Counsel Reasonably Halted Their Mental Health Investigation.

Regardless, the state courts reasonably applied *Strickland* because, faced with a similar set of facts, they reached the same conclusion as this Court in three cases, including *Strickland* itself.

In *Strickland*, the Court stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690-91. Wood evokes the latter scenario; that is, he claims that his trial team unreasonably halted its investigation into Wood's "mental deficiencies for purposes of mitigation" after reviewing the Kirkland Report. Blue Br. 24-25.

For the purpose of this appeal, Respondents adopt Wood's "red-light, green-light" analogy for judging the decision to halt an investigation. Blue Br. 27. Under *Strickland*, counsel has a duty to reasonably investigate a promising mitigation lead (*i.e.* "the green light") unless or until he encounters a "red light," at which point counsel may terminate his investigation without violating the Sixth Amendment. Blue Br. 27. The Court has defined the "red light" as a reason to believe that further investigation would either be "fruitless" or "harmful." *Strickland*, 466 U.S. at 691 (when counsel "has reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable"). Prior to

the state courts' decisions here, the Court held on three occasions that counsel reasonably halted an investigation after encountering one or both of these red-light indicators.

In *Strickland*, David Washington argued that his trial counsel performed deficiently in the penalty phase by failing, among other things, to "request a psychiatric report" and "to seek a presentence investigation report." 466 U.S. at 675. The Court held that counsel's decision not to embark down these investigative paths was reasonable because (1) "counsel could reasonably surmise from his conversations with [Washington] that character and psychological evidence would be of little help" and (2) Washington's post-conviction mitigating evidence would have been "harmful" if introduced at trial because it would have allowed the State to introduce Washington's "rap sheet" and psychological reports that rebutted Washington's "emotional disturbance" argument. *Id.* at 699-700.

In *Darden v. Wainwright*, 477 U.S. 168 (1986), Willie Darden's trial counsel "obtained a psychiatric report on [Darden], with an eye toward using it in mitigation during sentencing." *Id.* at 185. Counsel did not, however, introduce the report (or any other evidence) at sentencing. In holding that counsel reasonably "rejected use of the psychiatric testimony," the Court noted that the State could have countered with (1) its own psychiatric report that labeled Darden as a "sociopathic type personality" and (2) evidence of Darden's prior convictions, including an assault with the intent to commit rape. *Id.* at 186.

In *Burger v. Kemp*, 483 U.S. 776 (1987), Christopher Burger's attorney knew "some, but not all," of Burger's troubled childhood, and he knew that Burger possessed "an IQ of 82 and functioned at the level of a 12-year-old child." *Id.* at 779, 790-91. Counsel "determined that he need not undertake further investigation," however, and he did not present any mitigating evidence at trial. *Id.* at 795. Even though counsel "could well have made a more thorough investigation than he did," *id.* at 794, the Court deemed his decision not to present testimony from Darden or his psychologist reasonable because counsel feared that the jury would have learned from either man that Darden understood right from wrong and that he reveled in his crime. *Id.* at 791-92.

The Kirkland Report contained similar red-light indicators. Like counsel in *Strickland*, Wood's trial team knew after reading the Kirkland Report that Wood's subaverage intellect "would be of little help" in lessening Wood's moral culpability. *Strickland*, 466 U.S. at 699. The Kirkland Report indicated that Wood's "thinking was goal directed and logical" (J.A. 327) and that Wood's low intellectual functioning did not affect his ability to appreciate the criminality of shooting Ruby Gosha (J.A. 330)—just as Christopher Burger's low IQ did not prevent him from "understanding right from wrong." *Burger*, 483 U.S. at 791, n.9. Furthermore, because the Kirkland Report and the Kilby Evaluation reached the same conclusion regarding Wood's intellectual abilities (J.A. 327), counsel had reason to believe that further investigation into the subject would produce the same results; a supposition proved true when three psychologists and Wood's grade-school teachers presented "essentially identical" evidence at the Rule

32 hearing. Pet. App. 63a. Thus, counsel could have reasonably believed that further investigation would be "fruitless." *Strickland*, 466 U.S. at 691.

The Kirkland Report was also chock-full of "harmful" information. *Id.* Like counsel in *Strickland* and *Darden*, Wood's counsel faced the dilemma of hiding the 18 prior arrests listed in the Kirkland Report. J.A. 326-27. Even worse, the Kirkland Report revealed that Wood acknowledged his "injurious" feelings toward others, including an admission that he shot Barbara Siler "after seeing her with another man." J.A. 326. Deeming these problems as anything other than a "red light" would have resulted in a head-on collision with rebuttal testimony from Dr. Kirkland and Barbara Siler that "might be literally fatal" to Wood's mitigation case. *Burger*, 483 U.S. at 792.

To dispatch Wood's § 2254(d)(1) claim, the Court needs only to declare that the state courts' decision was objectively reasonable. *See Lockyear v. Andrade*, 538 U.S. 63, 70-71 (2003). When faced with similar facts, the state courts reached the same conclusion as this Court in *Strickland*, *Darden*, and *Burger*. Regardless of whether another jurist might rule differently, it cannot be objectively unreasonable to come down on the same side as this Court. Thus, Wood cannot clear § 2254(d)(1)'s bar to relief.

C. NEITHER *WILLIAMS* NOR *WIGGINS* CONTROLS THIS CASE.

Wood's reliance on the Court's subsequent decisions in *Williams v. Taylor*, 529 U.S. 326 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003), is

misplaced because neither case presented the issue here: Whether counsel reasonably halted an investigation when faced with *Strickland's* red-light indicators ("fruitless" or "harmful"). Blue Br. 24-34.

In *Williams*, trial counsel unreasonably failed to investigate evidence of Terry William's childhood abuse and borderline mental retardation, evidence that was contained within Williams' juvenile and social services records. 529 U.S. at 370, 373. Counsel failed to uncover this mitigating evidence because they never obtained and reviewed Williams' records, wrongly believing that "state law barred access to such records." *Id.* at 395. Using Wood's "red light" analogy, *Williams* has no application here because the Court was not confronted with a situation in which counsel, after receiving a potential mitigation lead, misinterpreted a "green light" for a "red light." Instead, *Williams* addressed a situation in which counsel failed to reach the intersection.[16]

In *Wiggins*, trial counsel unreasonably failed to follow-up on evidence of Kevin Wiggins' troubled life history contained within his presentence investigation ("PSI") report and social service ("DSS") records. 539 U.S. at 523-28. The Court deemed counsel's failure unreasonable because counsel halted their investigation of Wiggins's life history with these records, despite (1) the records

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[16] Wood's reliance on *Rompilla v. Beard*, 545 U.S. 374 (2005), which post-dates the state courts' decisions in this case, is misplaced for a similar reason. Blue Br. 34. The Court held that Rompilla's attorneys acted unreasonably because they failed to timely secure, then fully review, Rompilla's prior conviction file, not because counsel read the file and failed to follow-up on a promising lead. *Id.* at 383-90.

mentioning Wiggins' "misery as a youth" and his "disgusting" life in foster care and (2) being offered funds to retain a "forensic social worker" to create a "social history report." *Id.* at 523-24.

Unlike *Williams*, *Wiggins* presented a situation in which counsel unreasonably stopped investigating after viewing a "green light" (*i.e.* the notations in Williams' PSI and DSS records). But *Wiggins* differs from this case, *Strickland*, *Darden*, and *Burger* in that Wiggins' "counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." *Id.* at 525 (distinguishing *Strickland*, *Darden*, and *Burger*). In other words, unlike Wood's counsel, Wiggins' attorneys acted unreasonably because they never faced a "red light" before halting their investigation.

Because neither *Williams* nor *Wiggins* presented the same factual situation faced by Wood's counsel, the state courts cannot be deemed objectively unreasonable for failing to match their holdings. At best, Wood can argue that some jurists would place this case on the *Williams-Wiggins* side of the fence, while others would join the state courts on the *Strickland-Darden-Burger* side. But if reasonable jurists can disagree on which decisions were most applicable, and thus which outcome should have been reached, Wood cannot prove that the state courts unreasonably applied "clearly established" precedent from this Court. 28 U.S.C. § 2254(d)(1).

IV. WOOD CANNOT PROVE PREJUDICE.

Even if Wood could clear one of § 2254(d)'s bars for *Strickland's* deficient performance element, he cannot prove *Strickland* prejudice. Before delving into the reasons, however, Respondents address the proper application of *Strickland's* prejudice standard to Alabama law.

A. *STRICKLAND* PREJUDICE'S ANALYSIS IS JUDGE-CENTRIC WHEN APPLIED TO ALABAMA LAW.

To prove penalty-phase prejudice, a capital petitioner must establish "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Wood argues that, to meet this standard, he needs to establish a reasonable probability that just one of the 10 jurors who recommended a death sentence would have changed his vote had he known of Wood's low intellectual functioning. Blue Br. at 24 ("at least one more vote"), 53 ("at least one juror's calculus"), 55 ("at least one additional juror").

Wood's "one more juror" argument wrongly applies *Strickland* to Alabama law for two reasons. First, the trial court is the sentencer under Alabama law, and the jury's advisory verdict "is not binding upon the court." Ala. Code § 13A-5-47(e). The court must treat a life without parole ("LWOP") recommendation as a mitigating circumstance, *Ex parte Carroll*, 852 So.2d 833, 837 (Ala.2002), but the court is not required to give the recommendation any

amount of weight. *Harris v. Alabama*, 513 U.S. 504, 515 (1995). Second, Alabama juries cannot return an advisory penalty-phase verdict until 10 jurors vote for death or seven vote for LWOP. Ala. Code § 13A-5-46(f). The jury must continue deliberating until it reaches the required number of votes, or a mistrial is declared, and a new penalty-phase jury is empanelled. Ala. Code § 13A-5-46(g); *see also* J.A. 82-83 (trial court's jury instructions). Wood only received two LWOP votes; therefore, he needed to sway at least *five* more jurors to get a LWOP recommendation.[17] J.A. 84.

Because Alabama is a judge-sentencing state, *Strickland* prejudice is a judge-centric analysis. Wood can establish prejudice in one of two ways. First, Wood could establish a reasonable probability that the mitigating weight of his subaverage intellect would have successfully tilted the court's weighing calculus. Second, Wood could establish a reasonable probability that introducing evidence of his subaverage intellect to the advisory jury would have (1) persuaded at least five more jurors to recommend LWOP and (2) the added weight of a LWOP recommendation would have changed the outcome of the court's weighing analysis. He can do neither.

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[17] Wood seizes the "one juror" language from the Court's decision in *Wiggins*. 537 U.S. at 510. Unlike here, a single juror's vote mattered in *Wiggins* because Maryland law requires a unanimous jury vote to impose the death penalty. *Id.* (*citing Borchardt v. State*, 786 A.2d 631, 660 (Md. 2001)).

B. Wood's Sentencer Considered Evidence Of Wood's "Borderline Intellectual Functioning" At Trial.

The mitigating weight of Wood's subaverage intellect obviously would not have tilted the trial court's sentencing scales to LWOP because the trial court considered Wood's low intellectual functioning when sentencing Wood to death. In its weighing process, the trial court considered the McClaren Report and the Kirkland Report, which contained the results of the Kilby Evaluation. *See supra* at 11-12. From these reports, the trial court knew that (1) Wood functioned in the borderline range of intellectual functioning (J.A. 327, 329-30, 580-81); (2) Wood read at a third grade level (J.A. 327); and (3) Wood dropped out of school in tenth grade. J.A. 580. The trial court also witnessed Wood's intellectual abilities at trial. For example, at a pre-trial suppression hearing, Wood testified that, "I can read anything you put in front of me," Trial Tr. Vol. 1 at 168, and he proved it by reciting the arrest warrant he was shown 13 months earlier: "I read the names on there. Holly Wood intentionally caused the death by shooting Ruby Lois Gosha, with a firearm, a better description is [not] known to the affiant, 13-6A-2." *Id.* at 162.

In its final order, the trial court considered "that the defendant is functioning in the borderline range of intellect," but noted "the defendant does not have a mental disorder present that would detract from his ability to appreciate the criminality of his behavior with regard to this specific alleged instant offense." J.A. 104. The court then stated that it was "convinced beyond a reasonable doubt that the

aggravating circumstances . . . far outweigh[ed] the mitigating circumstances." J.A. 108. There is no probability, much less a reasonable one, that wrapping the same evidence in a new package would have changed the court's weighing calculus.

As a result, Wood's only path to prejudice is to establish a reasonable probability that introducing evidence of his subaverage intellect to the jury (1) would have swayed at least five more jurors to recommend LWOP and (2) the added weight of a LWOP recommendation would have changed the outcome of the trial court's weighing analysis. The Court need not speculate over the effect of a LWOP recommendation on the trial court, however, because Wood's evidence would have similarly failed with the advisory jury.

C. Presenting Evidence Of Wood's Low Intellectual Functioning To The Jury Would Have Further Tipped The Scales In Favor Of A Death Sentence.

The Kirkland Report is like a Trojan Horse. At first blush, it entices with the "inherently mitigating" evidence of Wood's borderline intellectual functioning. Blue Br. at 52. But had Wood's counsel wheeled it before the jury, its mitigating quality would have proved hollow; while its contents wrought havoc on Wood's penalty phase case.

1. Respondents agree that Wood's borderline intellectual functioning constitutes admissible, non-statutory mitigating evidence. But merely presenting such evidence does not assure a LWOP recommendation or sentence. *See, e.g., Sale v. State*,

8 So. 3d 330, 350-51 (Ala. Crim. App. 2008) ("borderline intellectual function;" 12-0 death recommendation; death sentence); *Yeomans v. State*, 898 So. 2d 878, 901-02 (Ala. Crim. App., 2004) ("borderline range of intelligence;" 11-1 death recommendation; death sentence). To make any difference, a defendant must give the evidence mitigating weight by explaining why *his* intellectual deficiencies matter under the facts of *his* case. Wood offers the following explanation:

> There is a reasonable probability that evidence of Wood's mental impairments would have changed at least one juror's calculus of his moral culpability because of Wood's 'diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others.'

Blue Br. 53 (*quoting Atkins v. Virginia*, 536 U.S. 304, 318 (2002)). But these attributes do not apply to Wood, and the State would have called Dr. Kirkland, Barbara Siler, and others in rebuttal to prove it.[18] *See George v. State*, 717 So. 2d 849, 852 (Ala. Crim. App. 1997) ("the State is allowed to rebut any evidence the [defendant] offers as a mitigating circumstance").

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[18] The only exception is that Wood suffered from "problems with anger and impulse control." J.A. 327. Of course, after learning that Wood shot and/or stabbed two ex-girlfriends, it is doubtful that a jury would have deemed Wood's anger control issues mitigating.

As for Wood's ability to "engage in logical reasoning" (Blue Br. 53), Dr. Kirkland determined that Wood possessed a "concrete reasoning ability" and "[h]is thinking was goal directed and logical." J.A. 327-28. As for his "ability to understand and process information" (Blue Br. 53), Dr. Kirkland found that Wood exhibited "a normal thought process." J.A. 327. That Wood could process information and think logically is further proved by the various jobs he held from ages 15 to 33, including driving a forklift, driving a delivery route, panning and stacking lead, and working at a pulp mill. J.A. 422, 476-77, 497-98, 539. Furthermore, Wood was "extremely good with his money," including the ability to pay bills, rent hotel rooms, and purchase and maintain automobiles. J.A. 35, 476-78, 512, 531.

Wood ably communicates with others. J.A. 510. Not only did he converse with his attorneys, he wrote letters in cursive handwriting to Barbara Siler while in prison. J.A. 481-82. Wood proved that he "understand[s] the reaction of others." Blue Br. 53. Immediately after shooting Ruby Gosha, Wood told his cousin that "he [knew] the police was coming." Trial Tr. Vol. 3 at 496. Understanding why they were coming, Wood tossed shotgun shells out the window, and he buried the murder weapon before he was arrested. *Id.* at 495-96, 499.

Most importantly in a juror's eyes, Dr. Kirkland would have testified that Wood knew that shooting Ruby Gosha was wrong. J.A. 330. In fact, Wood acknowledged to Dr. D'Errico that to "escape from law enforcement is against the law." J.A. 581.

As we stated at the outset, arguing to a jury that Wood's "mental deficiencies" mitigated his "personal culpability" for murdering Ruby Gosha was a fool's errand. Blue Br. 53. At best, the jury might have assessed a feather's weight to such evidence. But that weight, and much more, would have been counterbalanced by the door this strategy opened.

2. Attempting to prove that Wood suffered from "mental retardation and mental disability" would have destroyed two lines of Trotter's penalty phase strategy. J.A. 235. First, Trotter argued that Wood quit school to provide for his siblings. J.A. 68. As the court of appeals noted, Wood's new strategy may have convinced the jury that Wood quit school to escape his special education classes, not to provide for his family. Pet. 67a-68a. Even worse, had trial counsel followed Wood's post-conviction course, the jury would have learned from Wood's sister Macola that Wood's school career actually ended when Wood "got kicked out of school . . . because of the way he acted." R.32 Vol. 1, Sept. 18, 2000, Tr. 167.

Second, Trotter argued that Wood shot Ms. Gosha in a drunken fit of jealously, not with premeditated malice. J.A. 69-72. But Dr. Kirkland would have informed the jury that Wood professed that he did not drink alcohol on the day of the murder.[19] J.A. 326, 330.

Worst of all, arguing that Wood lacked the mental capacity to "engage in logical reasoning" or "to abstract from mistakes and learn from

[19]With the exception of relevancy, the Alabama Rules of Evidence, including the hearsay rules, do not apply during the penalty phase. Ala. Code § 13A-5-45(d).

experience" (Blue Br. 53, *quoting Atkins*, 536 U.S. at 318), would have opened the door to Wood's extensive criminal history, including his assault of Barbara Siler. *See, e.g.*, *Ferguson v. State*, 13 So. 3d 418, (Ala. Crim. App. 2008) (noting that Alabama's "appellate courts have looked to a myriad of factors in determining whether one is mentally retarded," including "being extensively involved in criminal activity"). Dr. Kirkland would have relayed Wood's confession that he shot Barbara Siler "after seeing her with another man." J.A. 326. Barbara Siler, who was waiting to testify at trial (J.A. 23), would have detailed the sordid story as she did at the Rule 32 hearing. J.A. 480-82. Finally, as the court of appeals aptly stated, the prosecutor would have driven the point home in closing: Wood learned from experience that "he needed to do more than merely shoot through a window—he had to sneak into the house and shoot [his ex-girlfriend] from point-blank range in her bed." Pet. App. 67a.

* * *

Attempting to negate Wood's "personal culpability" (Blue Br. 53) with evidence of mental retardation and mental deficiencies would have further tipped the jury's sentencing scales in favor of a death sentence. Consequently, Wood cannot establish a reasonable probability that (1) five jurors would have changed their death recommendations to LWOP, thereby (2) altering the trial court's conviction "beyond a reasonable doubt that the aggravating circumstances . . . far outweigh the mitigating circumstances." J.A. 108.

Nothing about Wood's subaverage intellect would have overcome Wood's date-me-or-die attitude toward women or his callous bravado concerning Ms. Gosha's murder: "I shot that bitch in the head, and blowed her brains out, and all she did was wiggle." Trial Tr. Vol. 3 at 495.

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1994 ed.)[20]

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed

---

[20] Congress "amended" this statute, and "redesignated" it 28 U.S.C. § 2254(e), in 1996. *See* 28 U.S.C. § 2254, Amendments.

to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(e)

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Sample of Alabama Rule 32 Proceedings[21]

Petitioner	Time Elapsed Between Trial & Rule 32 Hearing	Length of Rule 32 Petition
Wayne Holleman Travis	16 years and counting	70 pages
Anthony Ray Hinton	16 years	70 pages
Casey McWhorter	15 years	83 pages
Roy Edward Perkins	14 years	372 pages
Charles Stewart	13 years and counting	158 pages
Larry Smith	11 years	48 pages
William John Ziegler	8 Years and counting	297 pages

[21] The State requests this Court take judicial notice of the records in *Ziegler v. State*, CC-00-2891.60 (Mobile County); *Perkins v. State*, CC-92-478.60 (Tuscaloosa County); *Stewart v. State*, CC-90-630.60 (Talladega County); *Travis v. State*, CC-92-004.60 (Conecuh County); *Sockwell v. State*, CC-1988-1244.60 (Montgomery County); *Hinton v. State*, CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006), *McWhorter v. State*, CC-93-077.60 (Marshall County); and *Smith v. State*, CC-95-200104.60 (Marshall County).

REPLY BRIEF

Supreme Court, U.S.
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CAPITAL CASE
No. 08-9156

IN THE
Supreme Court of the United States

HOLLY WOOD,

Petitioner,

v.

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama,
and GRANTT CULLIVER, Warden,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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I. THE STATE COURT DECISION WAS AN UNREASONABLE DETERMINATION OF THE FACTS

The Alabama Court of Criminal Appeals recognized (J.A. 387) and Respondents concede (Red Br. 58) what any reasonably competent defense counsel would have realized after reading the Kirkland Report: that Wood's borderline intellectual functioning was potential mitigation evidence. The fact questions pertinent to Wood's ineffective assistance claim center on two issues: (1) Did Wood's trial counsel undertake any meaningful investigation into this potentially significant mitigation evidence; and (2) if not, did Wood's counsel make an informed strategic decision not to pursue Wood's mental deficiencies as mitigation? Pet. App. 56a. Although Respondents persuaded the Eleventh Circuit majority that Wood's counsel had conducted an adequate post-Kirkland Report mitigation investigation and that state court findings on that issue were "amply supported by the record" (Pet. App. 56a-57a), they now maintain that the state court made no such finding (Red Br. 3, 41, 42), and implicitly concede that any such finding would have been unreasonable.[1]

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[1] The Eleventh Circuit majority cited numerous historical facts found by the state court that supposedly supported the state court's determination that "counsel investigated a potential mental health defense, but decided against presenting it." Pet. App. 56a-57a, 201a; Blue Br. 43-51.

Respondents previously told this Court that "Dozier testified that [counsel] followed up on the information that was

(Continued on following page)

Respondents seek to cover their retreat by characterizing the issue of counsel's patently inadequate mitigation investigation as a "straw man." Red Br. 40-46.

Even putting aside the fact that Respondents' current contention is legally insufficient to support the state court decision (*see* Point II, *infra*), any finding that counsel decided to terminate investigation of mental health mitigation after reading the Kirkland Report was objectively unreasonable in light of the evidence in the state court record. That record plainly shows that counsel were interested in mental health evidence after the Kirkland Report, although their efforts to obtain such evidence were pitifully deficient.

A. The State Court Determination That Counsel Chose To Halt Their Mental Health Mitigation Investigation With The Kirkland Report Was Unreasonable

Respondents no longer maintain that Wood's counsel conducted any meaningful investigation of the mental health mitigation leads in the Kirkland

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contained in Dr. Kirkland's report" and cited "evidence in the record" that supposedly "support[ed] the state courts' finding that [counsel] conducted a thorough penalty phase investigation." Brief of Respondents in Opposition to the Petition for Writ of Certiorari 10, 21. Respondents – not Wood – have made an "about-face." Red Br. 41.

Report. Instead, Respondents now contend that the state court's "legal conclusion was based on" (Red Br. 38) its finding that "counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation." Resp. App. 51. According to Respondents, this finding amounts to a "determination that counsel chose to halt their mental health investigation with the Kirkland Report." Red Br. 23.[2] Even assuming, contrary to law, that such a finding alone could establish that Wood received constitutionally adequate representation, that finding was an unreasonable determination of the facts because it is contradicted by abundant evidence in the state court record, which the state court and the Eleventh Circuit majority ignored.

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[2] Respondents, like the Eleventh Circuit majority, also focus on the state court's finding that "Wood's trial counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest." Red Br. 38, 46; Resp. App. 51; Pet. App. 50a-55a. That issue is a red herring. Wood has never argued that his trial counsel should have called Dr. Kirkland as a witness or introduced his Report into evidence. Rather, Wood has consistently argued that his counsel were ineffective for failing to investigate and develop evidence of his mental deficiencies independent of the Kirkland Report.

1. The Kirkland Report Was Prepared For The Guilt Phase And Dozier's Decision That It Did Not Merit "Going Further" Was Limited To The Purpose For Which It Was Prepared

In attempting to justify the state court decision, Respondents, like the state court and Eleventh Circuit majority, ignore the limited purposes for which the Kirkland Report was prepared. Dozier, who was in charge of the guilt or innocence phase of the trial (J.A. 271), filed a Petition for Insanity Evaluation, Competency Evaluation and Treatment to determine whether Wood was competent to stand trial and whether he had an insanity defense to guilt. (R. Vol. 7, 216-18.)[3] The court thereupon ordered Wood to be examined to evaluate "his ability to understand the nature and object of the proceedings pending against him and his ability to reasonably assist his attorneys in his defense," and "his mental condition at the time of the alleged offense – specifically, whether any mental disease or defect existed at the time of the alleged offense which would have rendered the Defendant substantially lacking in his ability to either appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

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[3] *See* ALA. R. CRIM. P. 11.1 (1994) (stating standard for determining when defendant is incompetent to stand trial); ALA. CODE § 13A-3-1(a) (1994) (stating standard for defense to guilt based on defendant's mental disease or defect at time of crime).

(R. Vol. 7, 235-36.) The court-ordered examiner, Dr. Kirkland, therefore, limited the scope of his evaluation to assessing Wood's "competency to stand trial and mental state at the time of the alleged offense." J.A. 324. Dr. Kirkland concluded that Wood "is capable, at this time, of assisting his attorney in his defense and fully participating in the process of a trial," and that "[t]here was not a mental disorder present that would detract from his ability to appreciate the criminality of [his] behavior with regard to this specific alleged instant offense." J.A. 329, 330.

The Kirkland Report hampered any defense to guilt based on Wood's mental state at the time of the offense, and that is the only context in which Dozier could have determined that nothing in the Kirkland Report "merited going further," *e.g.*, that there was no need for another psychological evaluation to assess Wood's competency or mental state at the time of the offense. J.A. 283, 343, 345. That Wood's counsel may have decided not to pursue an insanity defense does not show that they also decided not to pursue evidence of Wood's mental deficiencies as mitigation. To the contrary, Dozier testified that evidence of "mental health problems" would have been presented at the penalty phase if counsel had been aware of it. J.A. 169. But there is no need to rely on Dozier's recollection of events because his conduct and that of his co-counsel, after receipt of the Kirkland Report,

plainly demonstrate they had not made a decision to halt any investigation for mental health mitigation.

2. Counsel Sought Mental Health Mitigation After They Reviewed The Kirkland Report

Respondents contend that a defense motion to suppress psychological evidence, argument and speculation supports the state court finding that Wood's trial counsel decided to forego any investigation into Wood's mental status. Red Br. 39. But Respondents have mischaracterized that motion, ignoring both its limited nature and another motion filed at the same time that *sought* psychological evaluations of Wood for mitigation purposes. The record shows that, on four distinct occasions after Wood's counsel received the Kirkland Report, Wood's counsel expressed their desire to obtain mental health mitigation evidence. The state court decision does not address this evidence, much less attempt to reconcile it with any finding that counsel decided to halt their mental health mitigation investigation with the Kirkland Report.

First, on September 2, 1994, more than three months after Dozier supposedly decided to drop any inquiry into mental health mitigation, Dozier argued a motion to discover prior "psychological evaluations" of Wood to help develop mitigation evidence. (R. Vol. 1, Tr. 80.) Concurrently, Trotter sought "psychological or other observations" from the Alabama Department

of Human Resources. (R. Vol. 1, Tr. 80.) Although the court granted their motion, counsel did nothing to ensure timely receipt of the information. J.A. 341.[4] Had counsel dropped any inquiry into mental health mitigation after reviewing the Kirkland Report, there would have been no reason to seek such "psychological" evidence.

Second, immediately before the penalty phase began, Trotter requested that "there be further psychological evaluation done of the defendant." J.A. 12. Respondents wrongly contend that Trotter's statement "supports the factual finding that counsel 'determined that nothing in the [Kirkland] report merited further investigation.'" Red Br. 43-44.[5] Trotter plainly stated the opposite – the psychological problems identified in the Report "need[ed] further

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[4] Counsel did not raise the issue again until the morning of the penalty phase hearing when Trotter told the court that "[w]e have[ ] never received those reports . . . ." J.A. 13. The judge replied that "[n]o one has brought notice to me that those records have not been filed," that he had given counsel "full access to them," and had "entered the order . . . some twenty-one days ago." J.A. 15.

[5] Respondents also rebut a straw man when they argue that Trotter's statements show that Wood's counsel decided not to present the Kirkland Report to the jury (Red Br. 40) or call Dr. Kirkland to testify (Red Br. 43). *See* note 2 *supra*. Trotter's statement concerning what "won't be admissible to this jury" plainly refers to the requested "further psychological evaluation," not the Kirkland Report. J.A. 12.

assessment," which is precisely why he requested another psychological evaluation. J.A. 12.[6]

Nor can Trotter's request be explained as a mere dissent from "Dozier's decision . . . not to seek another mental health evaluation." Red Br. 44. Dozier stood silently next to Trotter in the courtroom. There is no basis to reasonably conclude that Trotter's statements reflected a disagreement among counsel. Rather, the record plainly shows that Wood's counsel realized belatedly that the Kirkland Report, although prepared for a different purpose, contained valuable leads regarding mental health mitigation that they had failed to investigate and develop.

Third, after the penalty phase, Trotter wrote to his co-counsel to recommend that they "request an independent psychological evaluation – even if that means asking for a postponement of the sentencing hearing." J.A. 343-46. Dozier and Ralph did not reject that recommendation on the basis of any supposed prior "strategic" decision to forego mental health mitigation. Rather, they rejected it only because "they

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[6] Respondents also contend that Trotter's request was "based on evidence that Wood suffered from 'antisocial behavior' and 'anger control' issues, not borderline intellectual functioning." Red Br. 44 n.14. This purported distinction is meaningless, because the type of significant mental deficiencies Wood has are closely related to issues involving anger control and antisocial behavior. *See* Kenneth L. Appelbaum, M.D. & Paul S. Appelbaum, M.D., *Criminal-Justice Related Competencies in Defendants with Mental Retardation*, 22 J. PSYCHIATRY 483, 489 (1994).

didn't think [t]he Judge would grant a continuance." J.A. 285.

Fourth, at the sentencing hearing, Trotter argued that "the fact that, as reported in the [Kirkland Report], that Holly cannot use abstraction skills much beyond the low average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning ... would mitigate any aggravating circumstances in this case, and would require that the proper sentence for [this] case be life in prison without parole and not death." J.A. 88. There would have been no reason for Trotter to make that argument if counsel had determined six months earlier that such information would not be useful mitigation.

The motion to "suppress psychological evidence," which was filed prior to these events, does not support a finding that Wood's counsel had decided to drop the issue of Wood's mental status as a mitigating factor. The motion seeks to "suppress psychological evidence, argument or speculation *against [Wood].*" (R. Vol. 8, 375 (emphasis added).) That motion did not seek to limit Wood's ability to present mental health mitigation evidence. To the contrary, on the same day that Wood's counsel argued the motion to suppress (R. Vol. 1, Tr. 73), they also argued their motion to discover prior "psychological" evaluations of Wood for use in the penalty phase. (R. Vol. 1, Tr. 80.)

The motion to suppress was expressly directed at "prosecutorial argument" "beyond the reach of cross-examination" in the form of "psychological predictions of behavior [ ]or moral judgments expressed in psycho-babble" with "the state blindly foraging for some character flaw making the alleged crime explicable." (R. Vol. 8, 376.)[7] When Trotter conceded that counsel had no indication the State had such evidence, the court denied the motion. (R. Vol. 1, Tr. 74.)

In sum, the state court record cannot reasonably be characterized as silent (Red Br. 45) regarding whether counsel made a decision to halt their investigation for mental health mitigation with the Kirkland Report. As the Eleventh Circuit dissent stated, the only "reasonable reading of this record" is that Trotter "realized too late what any reasonably prepared attorney would have known: that evidence of Wood's mental impairments could have served as mitigating evidence and deserved investigation so that it could properly be presented before sentencing." Pet. App. 85a-86a.

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[7] Respondents' contention that through the motion to suppress "Trotter fought to prevent the jury from discovering and considering . . . anger control issues" (Red Br. 44 n.14) is insupportable. Trotter affirmatively submitted evidence that Wood "[n]eeds anger induced, acting out and reality therapy." J.A. 60-61.

B. Respondents' Proposed Three-Step Procedure For Applying Sections 2254(d)(2) And 2254(e)(1) Is Inconsistent With The Language, Structure And History Of AEDPA

Respondents also retreat from the Eleventh Circuit majority's application of sections 2254(d)(2) and (e)(1). The Eleventh Circuit majority improperly super-imposed section 2254(e)(1) on section 2254(d)(2) and required Wood to establish that the state court fact-finding was unreasonable by clear and convincing evidence in violation of this Court's contrary direction in *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Blue Br. 37-43. Respondents offer a three-step proposal for applying sections 2254(d)(2) and (e)(1) (Red Br. 36) that is not supported by any authority, including the Eleventh Circuit majority in this case, or even by their supporting *amici*. *See* CJLF Br. 10 n.3, 11.

1. Respondents' Proposal Is Inconsistent With The Language And Structure Of AEDPA

Respondents' proposal fails to account for the fact that sections 2254(d)(2) and (e)(1) impose independent requirements found in distinct sections of that statute. *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005). Had Congress intended the burden of proof in 2254(e)(1) to be a prerequisite for application of the standard of review in 2254(d)(2) as Respondents contend (Red Br.

36), it would have provided for that paradigm in plain language in a single section of the statute.

Respondents' contention that the plain language of section 2254(e)(1) shows that it applies to all habeas proceedings regardless of whether any evidence is submitted outside the state court record also fails. Red Br. 30. Section 2254(e) is a distinct section that provides rules for when federal courts can take evidence outside the state court record and the burden of proof governing fact-finding based, in part, on that evidence. The language and structure of the statute indicate that section 2254(e) does not apply in this case.[8]

Moreover, Respondents' approach renders section 2254(d)(2) superfluous. According to Respondents, if, after applying section 2254(e)(1), the "presumption survives, the petitioner's § 2254(d)(2) claim fails because a correct determination of the facts is a reasonable determination of the facts." Red Br. 22, 36. Conversely, as another court improperly merging sections 2254(d)(2) and (e)(1) has found, if the presumption in 2254(e)(1) does not survive because it is rebutted by clear and convincing evidence, the factual determination is "therefore objectively unreasonable." *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003) (citation omitted). Thus, under Respondents' approach,

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[8] That section 2254(e)(1) will apply only in a subset (perhaps 10%) of habeas proceedings (Red Br. 33) hardly renders it insubstantial.

section 2254(e)(1) would be sufficient to decide every case involving a challenge to state court fact determinations, leaving no independent role for section 2254(d)(2). *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (rejecting "reading [that] would render part of the statute entirely superfluous").[9]

Equally without merit is Respondents' contention that this Court has "agreed" that section 2254(e)(1) applies in cases "involving a review of the state court record under § 2254(d)(2)." Red Br. 28 (citing *Wiggins v. Smith*, 539 U.S. 510, 528 (2003); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("*Miller-El II*"); *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007)). None of those cases presented the question of the interaction of sections 2254(d)(2) and (e)(1), turned on that question, or even required the Court to engage in any analysis of that issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Indeed, when the issue was presented in *Rice v. Collins*, 546 U.S. 333, 339 (2006), which was decided after *Wiggins* and *Miller-El II*, this Court stated that "[w]e need not address that question." As Respondents acknowledge, in *Rice*, this Court "left open" the question on this appeal. Red Br. 28.

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[9] Respondents' formulation also is belied by the plain language of the statute because Respondents incorporate concepts such as "erred" and "correct" into section 2254(d)(2), which does not speak in those terms. *See Williams v. Taylor*, 529 U.S. 362, 411 (2000).

2. A Comparison With Prior Law Shows That Current Sections 2254(d)(2) And 2254(e)(1) Operate Independently

Respondents also misread AEDPA's history. Red Br. 31-34. Prior to AEDPA, the "power of inquiry on federal habeas corpus [was] plenary," including "the power to receive evidence and try the facts anew." *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *see also Wright v. West*, 505 U.S. 277, 289 (1992). In some circumstances, federal courts were mandated to hold evidentiary hearings. *Townsend*, 372 U.S. at 312-13. "In all other cases where the material facts [were] in dispute . . . [federal courts had] the power, constrained only by [their] sound discretion, to receive evidence bearing upon the applicant's constitutional claim." *Id.* at 318. Former section 2254(d) provided the burden of proof for federal court fact-finding, requiring, with certain exceptions, that petitioners "establish by convincing evidence that the factual determination by the State court was erroneous." Red Br. 3a.

AEDPA limited the circumstances in which federal courts can receive evidence to supplement the state court record. *See* 28 U.S.C. § 2254(e)(2). AEDPA also limited the circumstances in which federal courts would engage in independent fact-finding by adding a new provision, section 2254(d)(2), which bars relief unless petitioner can show that the state court decision was based on an unreasonable determination of the facts in light of the state court record or has

satisfied the standards for supplementing the state court record in federal court.

Contrary to Respondents' contention (Red Br. 31), AEDPA did not eliminate any "pre-presumption review of the state court record." Rather, AEDPA: (i) placed that review in a distinct section of the statute (section 2254(d)(2)); (ii) strengthened the standard of review by requiring federal courts to determine whether the state court decision was based on an objectively unreasonable determination of the facts (rather than whether the state court decision was fairly supported by the record); and (iii) barred federal courts from granting relief absent such a determination assuming there is no basis to supplement the state court record.[10]

In doing so, Congress enacted a distinct section governing review of state court fact-finding (2254(d)(2)) and de-linked it from the burden of proof governing federal fact-finding (2254(e)(1)), which no longer serves any purpose in cases where the state court record is not supplemented. If, after review under section 2254(d)(2), the federal court concludes that the state court decision was based on an unreasonable determination of the facts in light of the state court record, then there is no basis to apply any

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[10] In arguing that "deference is withheld" unless section 2254(e)(1) applies to cases involving only the state court record (Red Br. 34), Respondents ignore the deference afforded by Congress to state court decisions in sections 2254(d)(1) and (2).

presumption of correctness to the underlying fact-finding. If the federal court does not conclude that the state court decision was based on an unreasonable determination of the facts and the state court record was complete, then relief is barred and the presumption does not come into play. If the federal court does not determine that the state court decision was based on an unreasonable determination of the facts, but the state court record was incomplete through no fault of the petitioner, then the federal court must presume that the facts found by the state court are correct unless rebutted by clear and convincing evidence introduced in the federal court. That is the only sensible reading of the statute consistent with its language, structure and history.

II. THE STATE COURT DECISION INVOLVED AN UNREASONABLE APPLICATION OF *STRICKLAND*

It is clearly established federal law that "[e]ven assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *accord Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments

support the limitations on investigations"). As the Eleventh Circuit majority acknowledged: "Here, the issue becomes: Did counsel, before deciding not to present evidence of Wood's borderline intellectual functioning, make 'reasonable investigations' or 'a reasonable decision that ma[de] particular investigation unnecessary?'" Pet. App. 56a.

A. Any Reasonably Competent Attorney Would Not Have Concluded That The Kirkland Report Constituted A "Red Light" Justifying A Halt To Investigation Of Wood's Mental Deficiencies

The Kirkland Report contained information regarding Wood's significant mental deficiencies (J.A. 387), which Respondents concede would have constituted mitigation evidence. Red Br. 58. Wood's significant mental deficiencies are "inherently mitigating" (*Tennard v. Dretke*, 542 U.S. 274, 287-88 (2004)) and "exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). As shown in Point I.A, *supra*, Wood's counsel did not regard the Kirkland Report as a "red light." But if they had done so, their performance would have been deficient under *Wiggins*. Any reasonably competent attorney would not have terminated an investigation into Wood's mental deficiencies for potential use in mitigation after reading the Kirkland Report.

This Court has long recognized the "vitally important" role of counsel in conducting a "thoroughgoing investigation" prior to a capital trial. *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Wood's counsel had "a duty to make reasonable investigations [for mitigating evidence] or to make a reasonable decision that [made] particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *accord Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background" prior to the penalty phase).

The state court opined that "reasonable counsel could have decided against seeking another mental health evaluation, in order to prepare other, more promising, defenses for trial." Resp. App. 51. But regardless of what "reasonable counsel" hypothetically "could have decided" based on a different set of facts, the state court record plainly demonstrates that Wood's counsel did not decide to forego mental health investigation *in favor of more promising* evidence because they were not in a position to make such a determination. In May 1994 when Dozier supposedly made that decision, Wood's counsel were not aware of any "more promising" evidence, because they had not conducted any penalty phase investigation. Nor did counsel ever develop more promising mitigation evidence. The Alabama Supreme Court determined that "neither the jury nor the trial judge acted unreasonably by finding that no mitigating circumstances

existed in Wood's case" based on Trotter's "meager" penalty phase presentation. J.A. 131 n.1.[11]

Considering that the Kirkland Report contained leads for potential mental health mitigation and that Wood's counsel were not pursuing "other, more promising" lines of investigation, any reasonably competent defense attorney would not have halted their investigation for mental health mitigation with the Kirkland Report. That the Kirkland Report found Wood ineligible for an insanity or incompetency defense is immaterial. "One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider." *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).[12] Indeed, the ALABAMA CAPITAL DEFENSE TRIAL MANUAL, which each of Wood's counsel consulted and relied on (J.A. 145, 178, 320), reiterated that "serious mental illness that would not rise to the level of mental

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[11] Their failure to investigate and develop evidence for the penalty phase is evident from the three lawyers' time records, which on their face demonstrate that up until a month before trial when the entries stopped, they did almost nothing in this area. *See* J.A. 311-22.

[12] *See generally* Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237, 261 (2007-08) ("developing mitigating evidence is quite different" from evaluating competency or insanity).

incompetency or insanity may yet help explain the client's behavior" at the penalty phase.[13]

Following Respondents' argument that the Kirkland Report constituted a "red light" to its logical conclusion would lead counsel to halt their mental health mitigation investigation in those cases in which they are most important. A capital case will never proceed to sentencing if the defendant is found incompetent to stand trial or not guilty by reason of insanity. Evaluations such as the Kirkland Report are obtained where, as here, counsel, such as Dozier, believes that the defendant may be "suffering problems related to some mental illness or personality disorder." (R. Vol. 7, 216.) If counsel treat a finding that their client's perceived mental illness or personality disorder does not render the client incompetent or establish an affirmative defense to guilt as a red light signaling a halt to any investigation for mental health mitigation, then such mitigation evidence would never be pursued in precisely those

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[13] ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER, ALABAMA CAPITAL DEFENSE TRIAL MANUAL 539 (2d ed. 1992). That Manual also advised counsel to "approach [the sentencing phase of a capital trial] as a major trial, not an afterthought" because "[i]t may very well be the only trial at which your client has a chance to prevail." *Id.* at 537. It further cautioned that "[t]he process of investigation is extremely time consuming: It cannot be done in the last few weeks before trial." *Id.* at 538; *see also id.* at 56-81 (questionnaire to collect information for penalty phase "with a special emphasis on potential mental health claims").

cases in which counsel has reason to believe that inherently mitigating evidence might be available.

Nor would competent counsel have decided to terminate further inquiry into Wood's mental function merely because the Kirkland Report contained some information adverse to Wood. The supposedly harmful information in the Kirkland Report would not have been admissible through testimony from Dr. Kirkland or submission of his Report. As the trial court correctly told counsel (R. Vol. 1, Tr. 73), the results of a court-ordered competency evaluation would "not be admissible as evidence in a trial for the offense charged" (ALA. R. CRIM. P. 11.2(b)(1) (1994)) and the results of a court-ordered evaluation of a defendant's mental state at the time of the offense would have been "admissible only if the defendant pleads 'not guilty by reason of mental defect or disease.'" ALA. R. CRIM. P. 11.2(b)(2) Author's Comments § 11.2 (Hugh Maddox Commentary, Michie Co. 2d ed. 1994).

The Alabama Rules reflect the principle that court-ordered psychological evaluations cannot be used against a defendant consistent with the Fifth Amendment except in rebuttal for a purpose that has been disclosed to the defendant and his counsel prior to the evaluation. *See Estelle v. Smith*, 451 U.S. 454, 464-65 (1981); *Buchanan v. Kentucky*, 483 U.S. 402, 421-24 (1987); *Ex parte Wilson*, 571 So.2d 1251, 1258 (Ala. 1990). Prior to his evaluation, Dr. Kirkland notified Wood that "*none of the information [he obtained] would be used against him concerning the*

charge itself." J.A. 324 (emphasis added). Neither Wood nor his counsel were ever told that the Kirkland Report or Dr. Kirkland's testimony might be used against Wood beyond the limited purpose of the Report.

Furthermore, the supposedly harmful information in the Kirkland Report, which related to Wood's competency and mental state at the time of the offense, would not have been admissible – through any source – to rebut mitigation evidence, because it is irrelevant to Wood's significant mental deficiencies. "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial." *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). Notably, Respondents did not call Dr. Kirkland to testify at the Rule 32 hearing in rebuttal to Wood's evidence of his significant mental deficiencies. Instead, Respondents called two other psychologists, neither of whom testified about, or relied on, Wood's ability to understand right from wrong, his criminal history or any related issues.

None of the cases cited by Respondents supports their contention that the Kirkland Report constituted a "red light" justifying a supposed decision to halt investigation of Wood's mental deficiencies. None even involves counsel's failure to pursue such evidence. In each case, counsel had information that directly contradicted the potential mitigation evidence that

the petitioner later claimed on post-conviction review should have been presented.

In *Strickland*, "[t]rial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help." *Strickland*, 466 U.S. at 699. Moreover, the psychiatric examinations presented in the post-conviction proceedings "would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case." *Id.* at 700.

In *Burger v. Kemp*, 483 U.S. 776, 790-91 (1987), the psychologist whom counsel employed to examine his client prior to trial "indicated that he would not be able to provide helpful testimony." *Burger v. Kemp*, 753 F.2d 930, 935 n.4 (11th Cir. 1985). Wood's counsel never retained a defense psychologist to assist them with developing mitigation evidence – as opposed to a court-appointed psychologist to assess competency and insanity defenses – and had no reason to believe that such a psychologist would have been unable to provide helpful testimony about Wood's mental deficiencies.[14]

In *Darden v. Wainwright*, 477 U.S. 168, 184-85 (1986), counsel obtained a "psychiatric report on

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[14] *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (criminal defendant has right of "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense").

petitioner, with an eye toward using it in mitigation during sentencing." The psychiatrist indicated "that petitioner 'very well could have committed the crime; that he was, as I recall his [the psychiatrist's] term, sociopathic type personality,'" which would have directly contradicted "testimony that petitioner was incapable of committing the crimes." *Id.* at 186.

In contrast, nothing in the Kirkland Report directly contradicted evidence of Wood's significant mental deficiencies. In failing to pursue the "green light" in the Kirkland Report regarding Wood's mental deficiencies, Wood's counsel "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527-28.

B. Wood's Argument That The Eleventh Circuit Majority Misapplied Section 2254(d)(1) Is Properly Before This Court

Respondents contend that Wood's section 2254(d)(1) argument is not fairly included within the question presented. Red Br. 47-48. To the contrary, the first question asks whether it was an unreasonable determination of the facts to conclude that "the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision." Pet. i. That question cannot be decided without considering the relevant facts in the context of the

applicable legal principles in *Strickland*, *Williams* and *Wiggins* for determining what constitutes a "strategic decision." For that reason, Wood argued that the Eleventh Circuit erred in its application of section 2254(d)(1) (Pet. 22-27; Red Br. 48) in a subpoint to the first point in his Petition for Certiorari, which challenged the court of appeals' treatment of his ineffective assistance claim. Pet. 13-27. The first question presented fairly includes all the arguments in support of that first point, including Wood's section 2254(d)(1) argument. *See* SUP. CT. RULE 14.1(a) ("[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein").

This "Court repeatedly has stated that when resolution of a question of law is a predicate to intelligent resolution of the question on which we granted certiorari, it can be regarded as fairly comprised within it." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 457 (9th ed. 2007) (internal quotation marks omitted). Wood's section 2254(d)(1) argument is, at the very least, a predicate to intelligent resolution of Wood's section 2254(d)(2) argument. *See City of Sherill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005); *Eddings v. Okla.*, 455 U.S. 104, 113 n.9 (1982).

The cases on which Respondents rely are inapposite. In *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993), this Court concluded that the single question presented challenging the substance of the court of appeals' judgment

did not fairly include the court of appeals' denial of petitioner's motion to intervene. Wood plainly was a party below with standing to raise the questions presented in this Court.

In *Yee v. Escondido*, 503 U.S. 519, 536 (1992), the Court held that the question presented was limited to a physical taking (as distinct from a regulatory taking) issue because physical taking "was the only ground of decision in two previous Court of Appeals cases, *departure from which was said by the question presented to be the issue in the appeal.*" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 380-81 (1995) (emphasis by Court). The Eleventh Circuit addressed Wood's arguments under both sections 2254(d)(1) and (2). Pet. App. 49a, 53a-61a.

III. RESPONDENTS DO NOT ADDRESS THE REASONABLENESS OF THE STATE COURT'S DECISION REGARDING PREJUDICE

As Wood previously demonstrated, the state court's determination that Wood was not prejudiced by his counsel's deficient performance because of the nature of the crime and the state court's finding that Wood is not mentally retarded was based on: (1) an unreasonable application of *Williams* and other well-settled precedent of this Court; and (2) an unreasonable determination of the facts in light of the state court record. *See* Blue Br. 51-56. Respondents do not and cannot make any attempt to justify the state

court's prejudice determination based on the state court's analysis. Instead, Respondents offer their own analysis unrelated to the state court's prejudice analysis. As a result, Respondents' analysis is not entitled to any deference under AEDPA. *Wiggins*, 539 U.S. at 529.

Respondents contend that capital sentencing in Alabama is "judge-centric" (Red Br. 56) and that the "mitigating weight of Wood's subaverage intellect obviously would not have tilted the trial court's sentencing scales to LWOP because the trial court considered Wood's low intellectual functioning when sentencing Wood to death." Red Br. 57. Respondents' argument ignores the central role that the jury plays under this Court's death penalty jurisprudence and Alabama law: "the role of the advisory jury is so essential that a failure to present mitigating evidence to the jury cannot easily be cured at the judicial sentencing stage." *Brownlee v. Haley*, 306 F.3d 1043, 1075 (11th Cir. 2002). The court's sentencing decision absent a fully-informed jury recommendation has little meaning.

Moreover, the trial court itself was not fully informed. Because Wood's counsel had not developed the evidence, all Trotter was able to do at the sentencing hearing was read a few isolated phrases (absent any explanation or context) from the Kirkland Report (J.A. 88) which, because it was prepared for another purpose, was, according to Respondents, "chock-full of 'harmful' information." Red Br. 52. The judge had another reason not to take

Trotter's short presentation seriously: On the morning of the sentencing trial, the judge had agreed twice to consider, after the jury was released, Trotter's "request that there be further psychological evaluation done of the defendant." J.A. 12. But Trotter never followed up that request and the judge reasonably concluded he had nothing to offer.

Because Wood's counsel failed to investigate his significant mental deficiencies, neither the sentencing jury nor judge knew that: (1) Wood's IQ is between 59 and 64, which means he ranks in the lowest 1 percent of the total population (which Respondents' expert acknowledged "falls within the range of mentally retarded") (J.A. 403, 447, 491, 508, 541, 573; *Atkins*, 536 U.S. at 342 n.5; DAVID WECHSLER, WECHSLER ADULT INTELLIGENCE SCALE – THIRD EDITION ADMINISTRATION AND SCORING MANUAL 24 (Harcourt Brace & Co. 1997)); (2) Wood's functional academics "are very low, like second to fourth grade level," which is "an area that he functions in the mentally retarded range" (J.A. 507-08, 530); (3) Wood was classified as "educable mentally retarded," placed in special education classes held in the school's basement, and called a "retard" by other students (J.A. 402-03, 407-08; (R. Vol. 16, Sept. 18, 2000 Tr. 168, 188)); (4) as a special education student, Wood only functioned between the first and third grade levels (J.A. 414-15); and (5) even in the view of Respondents' psychologist, Wood met all but one criterion needed "to justify a diagnosis of mental retardation" (J.A. 506-09). Thus, there is no basis for Respondents' contention that the evidence

that was presented at the post-conviction hearing was "essentially identical" to the information in the Kirkland Report. Red Br. 51. Even according to Respondents' experts, if Wood had significant deficits in only one additional area of adaptive functioning, he would have been diagnosed as mentally retarded, which since 2002 would constitute a categorical bar to his execution.

Respondents' remaining prejudice arguments proceed from the false premise of what would have happened if Wood's counsel had "wheeled the [Kirkland Report] before the jury." Red Br. 58. Wood has never claimed that the Kirkland Report should have been presented to the sentencing jury. In any event, Respondents' version of what would have happened if Wood's counsel had presented evidence of his significant mental deficiencies to the sentencing jury bears little resemblance to what actually happened during the post-conviction proceedings.

Respondents contend that evidence of Wood's mental deficiencies would have been rebutted by calling Dr. Kirkland and Barbara Siler. Red Br. 59. In fact, Respondents did *not* call Dr. Kirkland as a witness at the post-conviction hearing. The psychologists who did testify on behalf of Respondents did *not* address Wood's ability to appreciate the criminality of his conduct, to distinguish right from wrong, or any other allegedly harmful information in the Kirkland Report. Red Br. 60. Although that information may have been relevant to assessing Wood's competency and affirmative defense based on insanity, it had no bearing on Wood's significant mental deficiencies.

Respondents are also incorrect that presenting evidence of Wood's significant mental deficiencies "would have opened the door to Wood's extensive criminal history." Red Br. 62. This Court's precedents indicate that a penalty phase defense that relies on evidence of good character may open the door to evidence of bad acts. *See, e.g.*, *Strickland*, 466 U.S. at 700. But Wood's significant mental deficiencies do not implicate his character. Indeed, counsel's penalty phase presentation consisting of testimonials from family members that Wood was a "good boy" (J.A. 26) and a "loving boy" (J.A. 35) ran a far greater risk of opening the door to Wood's criminal history.

Respondents' psychologists did not recite Wood's criminal past or ascribe any significance to it in relationship to Wood's significant mental deficiencies. To the extent this history was discussed at all, it supported Wood's contention that his significant mental deficiencies affected him in ways that mitigated that history. For example, the only relevant testimony regarding Wood's encounter with a police officer during a traffic stop that resulted in his being charged with "escape" was that it showed that Wood's judgment "was quite impaired" and that he does not "understand[] the consequences of his own behavior at times." J.A. 466-67.[15]

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[15] According to the police officer, after she stopped Wood for speeding, he presented a false identification and then fled barefoot into the woods, leaving behind his sneakers and his vehicle. J.A. 394-96. The next day, Wood voluntarily appeared at

(Continued on following page)

As for Barbara Siler's potential as a rebuttal witness, the jury already knew about Wood's assault. In his opening argument, the prosecutor, without objection from Wood's counsel, told the jury that Wood was on parole from a conviction "of assault in the first-degree for shooting another young woman with a shotgun, and nearly killing her, was sentenced to fifteen years in the penitentiary, after serving a little over six years of that sentence was paroled and was a parolee at the time that he killed Ms. Gosha." J.A. 19. The court also instructed the jury on the elements of first-degree assault. J.A. 76. Siler's testimony regarding the circumstances of that assault, even if admitted,[16] would have added little to what the jury already knew.

In any event, to the extent that the details of Wood's prior felony conviction became known to the jury, evidence of his significant mental deficiencies would have given the jury some context in which to

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the police station to ask for his car. He was arrested, although he insisted that the police "had the wrong man." J.A. 397, 399-400.

[16] Wood's presentation of his significant mental deficiencies would not have altered the trial court's conclusion that evidence regarding the circumstances surrounding the assault was inadmissible. The State was able to establish an aggravating circumstance through introduction of the underlying judgment of conviction. The circumstances of the assault also did not rebut evidence of Wood's significant mental deficiencies. When Respondents asked Dr. Prichard about it, he said that there "was likely some planning involved in that behavior" with no explanation that it played any role in his evaluation. J.A. 530.

assess it. Presented as Respondents' brief presents it, Wood's assault against Barbara Siler offers one picture. Presented in the context of an adequate diagnosis and explanation of Wood's severe mental impairments, that offense has a different meaning and would likely persuade a jury or a judge that the appropriate response to Wood's crimes was a sentence of life imprisonment without parole – the sole alternative to a death sentence under Alabama law. In *Williams v. Taylor*, the Virginia Supreme Court, the Fourth Circuit, and the State all emphasized Williams' horrendous criminal record (which included brutal assaults on the elderly, arson and many robberies). *See Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000). But this Court understood the mitigating force of the life-history and borderline mental retardation evidence neglected by Williams' lawyers, which would have put his criminal record into true perspective. *Williams*, 529 U.S. at 398.

Furthermore, to the extent that Siler's potential testimony had any possible relevance to Wood's mental capacity, that testimony likely would have supported his position that his intellectual deficiencies translated into deficiencies in other areas. Respondents' psychologist, Dr. Prichard, testified after interviewing Siler that her questionnaire responses showed that Wood had adaptive functioning "deficits in the area[s] of communications and socialization." J.A. 534-36.

Finally, Respondents argue that offering evidence of Wood's significant mental deficiencies would have

been inconsistent with evidence concerning Wood's reasons for leaving school and with Trotter's argument that "Wood shot Ms. Gosha in a drunken fit of jealousy, not with premeditated malice." Red Br. 9. Even putting aside that Dr. Kirkland's testimony on the issue of Wood's alcohol consumption would have been inadmissible, Trotter's arguments on these grounds were so inconsequential that the trial court did not even address them in its sentencing order. J.A. 97-108.

Had Wood's counsel conducted an adequate investigation, the jury would have heard the "inherently mitigating" evidence of Wood's "significantly impaired intellectual functioning," which "is obviously evidence that might serve as a basis for a sentence less than death." *Tennard*, 542 U.S. at 288 (internal quotation marks omitted). Without that critical information, the jury lacked a "vehicle for expressing its reasoned moral response . . . in rendering its sentencing decision" and there is no basis to conclude that the jury "made a reliable determination that death [was] the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal quotation marks omitted).

CONCLUSION

For the reasons stated above and in Wood's opening brief, this Court should reverse the judgment of the court of appeals, and grant the petition for a writ of habeas corpus.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-9156

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IN THE

Supreme Court of the United States

HOLLY WOOD,

Petitioner,

—v.—

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Alabama is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving serious questions regarding federal court authority to enforce the Sixth Amendment right to effective assistance of counsel. Given its longstanding interest in the vindication of federal rights, the questions before the Court are of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

The petitioner, Holly Wood, was convicted of murder in an Alabama state court and was sentenced to death. In state post-conviction proceedings and in a petition for federal habeas corpus relief, Wood contended that his capital sentence was invalid because defense counsel rendered ineffective assistance at the sentencing phase of the trial. The

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[1] Respondent has filed a blanket letter of consent to all *amicus* briefs. Petitioner's letter of consent to the filing of this *amicus* brief has been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief's preparation or submission.

state court adopted verbatim the Alabama Attorney General's proposed findings of fact and, on that basis, rejected Wood's constitutional claim. The United States District Court for the Middle District of Alabama granted federal habeas relief. The district court concluded that the state court decision was based on an unreasonable determination of the facts and, accordingly, that federal relief is not foreclosed by 28 U.S.C. §2254(d)(2). The district court accepted state court findings that Wood's counsel had procured a report from Dr. Karl Kirkland regarding Wood's competency to stand trial and his ability to form the mental state required for conviction. But the district court held that it was unreasonable for the state court to find that experienced defense counsel made strategic decisions not to investigate or introduce evidence of mental retardation that might persuade the jury to impose a life sentence. A divided panel of the United States Court of Appeals for the Eleventh Circuit reversed on the ground that federal habeas relief is barred by §2254(d)(1) and (2). This Court granted certiorari to address the questions presented.

SUMMARY OF ARGUMENT

This is another case in which the Court must clarify the proper understanding and application of 28 U.S.C. §2254(d), an important provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214. As petitioner's brief amply explains, the court of appeals erroneously concluded that federal habeas relief is foreclosed in this case. This brief focuses on §2254(d)(2) and, in turn, on the interplay between

§2254(d)(2) and 28 U.S.C. §2254(e)(1), an adjacent provision in AEDPA. Lower courts have struggled with the relationship between §2254(d)(2) and §2254(e)(1), both of which deal with the significance of state factual determinations regarding claims for federal habeas relief. This Court has not had occasion to clarify the way these two provisions fit together and, indeed, has expressly reserved decision on the applicability of §2254(e)(1) to cases like this one. The Eleventh Circuit decision below demonstrates that an authoritative treatment is needed and should be provided here to correct the Eleventh Circuit's misunderstanding and resulting erroneous decision.

The court of appeals made five crucial errors. *First*, it failed to recognize that §2254(d)(2) and §2254(e)(1) play complementary roles in cases in which the availability of federal habeas relief depends primarily on the facts underlying petitioners' legal claims. The precise language in these two provisions makes it clear that they function together, each presupposing the other. The §2254(d)(2) "reasonableness" standard governs cases (like this one) in which the only evidence is the evidence presented in state court. The §2254(e)(1) "presumption of correctness/clear and convincing evidence" standard is reserved for cases in which additional evidence is developed in federal habeas proceedings.

Second, the court of appeals applied the §2254(e)(1) presumption to state court conclusions regarding issues on the borderline between matters of fact and mixed issues of law and fact. Then, it

combined the "presumption of correctness/clear and convincing evidence" standard in §2254(e)(1) with the "reasonableness" standard in §2254(d)(2). In so doing, the Eleventh Circuit committed the very error this Court identified in *Miller-El v. Cockrell*, 537 U.S. 322 (2003)—requiring a habeas petitioner to prove by clear and convincing evidence that state factual determinations were unreasonable.

Third, the court of appeals lifted the §2254(e)(1) "clear and convincing evidence" standard out of its proper field of operation (cases involving new evidence in federal court) and injected it into territory governed by the "reasonableness" standard in §2254(d)(2) (cases involving only the evidence presented in state court). In so doing, the Eleventh Circuit erroneously applied the §2254(e)(1) "clear and convincing evidence" standard to state factual determinations without regard to the requirement in §2254(d)(2) that state findings must be reasonable.

Fourth, the court of appeals neglected the explicit language in §2254(d)(2) indicating that federal relief is barred only if the factual determinations on which a state court "based" its "decision" on the merits of a petitioner's claim were reasonable. In so doing, the Eleventh Circuit erroneously concluded that federal relief is barred in this case because *immaterial* state findings were purportedly reasonable.

Fifth, the court of appeals applied the presumption of correctness established by §2254(e)(1) to state factual determinations without regard to the process by which the findings were reached and the evidentiary support they enjoyed. In so doing, the Eleventh Circuit erroneously inferred an

extraordinary change in federal policy from legislative silence. When §2254(e)(1) is read in context with §2254(d)(2), it becomes clear that §2254(e)(1) presupposes that the state findings to which the presumption applies were reached reasonably. If the presumption of correctness in §2254(e)(1) were unconditional, §2254(e)(1) would raise serious questions under the Suspension Clause. To avoid constitutional doubts, the silence in §2254(e)(1) should be construed to accommodate the "reasonableness" standard in §2254(d)(2).

ARGUMENT

I. THE COURT OF APPEALS FAILED TO RECOGNIZE THE COMPLEMENTARY ROLES PLAYED BY §2254(d)(2) AND §2254(e)(1)

The issues before the Court are shaped by the relationship between 28 U.S.C. §2254(d)(2) and 28 U.S.C. §2254(e)(1). Section 2254(d)(2) provides that federal relief is barred unless a state court decision on the merits of a petitioner's claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Section 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that a petitioner can rebut the presumption by "clear and convincing" evidence. The juxtaposition of these provisions has confused the lower courts and muddied litigation in cases in which state court factual determinations are central to the proper treatment of claims for federal relief. On careful

examination, §2254(d)(2) and §2254(e)(1) can be reconciled in a way that gives each a role to play in a coherent and workable framework that is entirely consistent with the statutory language. The circuit court below applied these two provisions without considering their complementary roles and, in so doing, reached an erroneous result.

Both §2254(d)(2) and §2254(e)(1) are concerned exclusively with state court determinations of "factual" issues—that is, questions of primary, historical fact (as opposed to legal issues or mixed questions of law and fact). Beyond that common ground, these two provisions differ in important ways. Three aspects of §2254(d)(2) are salient: *first*, a federal habeas court is concerned only with state factual determinations on which the state court grounded its decision on the merits; *second*, the federal court is to hold those state findings to a standard of "reasonableness"; and, *third*, the court is to judge the reasonableness of state determinations in view of the existing state court record. Three different aspects of §2254(e)(1) are crucial: *first*, a federal habeas court is to decide whether state factual determinations were not only reasonable but correct; *second*, the federal court is to presume state findings to be correct and hold rebuttals to a standard of "clear and convincing evidence"; and, *third*, the court is to judge whether clear and convincing evidence disproves state findings on the basis of all the evidence available—without confining itself to the evidence presented to the state court.

Judge Kozinski has identified the key to understanding *why* §2254(d)(2) and §2254(e)(1)

display these important differences. *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004). These two adjacent provisions appear together and must be read together, each presupposing the other. Both orchestrate a federal court's duties with respect to the facts fortifying federal claims, but they complement each other by addressing different scenarios. Section 2254(d)(2) deals with cases (like this one) in which no additional evidence is introduced in federal court and a federal habeas court's analysis is necessarily limited to an examination of what a state court did with the evidence in the existing state record. This is why §2254(d)(2) concentrates on the evidence that formed the basis of the state court decision on the merits and why §2254(d)(2) limits attention to the evidence developed in state court—that is, by hypothesis, the only evidence in existence. Section 2254(d)(2) does not address cases in which §2254(e)(2) allows petitioners to offer additional proof in federal habeas proceedings. *See Michael Williams v. Taylor*, 529 U.S. 420 (2000). When a case takes that turn, §2254(d)(2) presupposes that the baton will be handed off to §2254(e)(1).

If the state court's decision on the merits *was* based on an unreasonable determination of the facts, the state decision is not entitled to deference. Section 2254(d)(2) does not bar a federal court from awarding habeas relief, provided that the federal court itself concludes that the claim is meritorious. Nor does §2254(e)(1) enter the picture. Since the federal court has already concluded that the state court's factual determinations were unreasonable, the court can

scarcely presume those very findings to be correct. Section 2254(e)(1) presupposes the analysis entailed in §2254(d)(2) with respect to the evidence in state court and is tailored for the different task of evaluating additional evidence, extrinsic to the state record. The presumption in §2254(e)(1) thus favors only state findings found to be reasonable. Where, by hypothesis, the state court's findings were unreasonable, the federal court must determine the factual and legal issues *de novo* and can grant relief if it reaches an independent judgment that the claim is meritorious.

If the state court's decision on the merits was *not* based on an unreasonable determination of the facts, the state decision is entitled to deference on the existing state court record, barring any independent error of law. Section 2254(e)(1) then comes into play and directs the federal court to presume that the facts the state court reasonably determined are correct. The petitioner can now succeed under §2254(e)(1) only by presenting the federal court with new evidence that the state court did not see—evidence that, when added to the evidence in the state record, clearly and convincingly proves that the state court's findings were erroneous. This is why §2254(e)(1) does not restrict the federal court's attention to the evidence as it was in state court. It is also why §2254(e)(1) provides that a state factual determination is presumed to be *correct* (rather than that a state finding is presumed to be *reasonable*) and why the standard for rebuttal is "clear and convincing evidence" (rather than "reasonableness"). When §2254(e)(1) is triggered, state findings

reasonably supported by the state record are entitled to respect—which takes the form of the §2254(e)(1) presumption in their favor and the demanding "clear and convincing evidence" standard for evaluating new evidence in rebuttal. The point is that the federal court is now open to the possibility that the state court acted reasonably in light of the evidence it was given, but still arrived at incorrect factual determinations in ignorance of the additional proof gathered in federal court.

Reading §2254(e)(1) to apply only when petitioners offer new evidence in federal court gives effect to §2254(e)(1) apart from §2254(d)(2), thus satisfying the canon that each provision in a statute should be accorded independent meaning. Section 2254(d)(2) bars federal relief when federal and state courts have a reasonable disagreement about the facts in light of a common body of evidence. Section 2254(e)(1) recognizes that the situation is quite different when a federal court arrives at different factual determinations with the help of additional proof. In a case of that kind, the state court made findings in reliance on an incomplete evidentiary record. With the advantage of new information, the state court might not reach the same conclusions again. Accordingly, in a case in which §2254(e)(2) permits a federal court to take more evidence, the federal court may award habeas relief without simply substituting its own judgment for that of the state court. For all that appears, the state court would agree with the federal court if the state court were to consider evidence that previously escaped its

attention. See *Torres v. Lytle*, 461 F.3d 1303, 1312 (10th Cir. 2006).[2]

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[2] An alternative account of §2254(d)(2) and §2254(e)(1) was suggested to the Court in *Miller-El v. Cockrell*, *supra*, and was later adopted by Judge Chertoff in *Lambert v. Blackwell*, 387 F.3d 210 (3d Cir. 2004). Prior to 1996, when §2254(d)(2) was not yet in place, this Court read the presumption of correctness (then codified at 28 U.S.C. §2254(d)) to draw the gross distinction between issues of fact and mixed questions of law and fact. The Court recognized that the "fact" category embraces a continuum of matters, ranging from primary descriptions of the details of historical events (called "subsidiary" facts in the literature) to inferences drawn from subsidiary facts (called "ultimate" facts), which can determine the outcome of litigation and thus approach the border between facts and judgments on mixed issues. See *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944). According to this different account, AEDPA introduced §2254(d)(2), and reenacted the presumption in an amended form in §2254(e)(1), in order to draw the distinction between subsidiary and ultimate facts *within* the general category of facts for purposes of habeas corpus. Specifically, the "presumption of correctness/clear and convincing evidence" standard in §2254(e)(1) now applies only to state findings of subsidiary facts, while the "reasonableness" standard in §2254(d)(2) covers state determinations of ultimate facts. This is why, according to this alternative account, §2254(d)(2) expressly attends to factual determinations on which the state court's decision was "based" and why §2254(e)(1) is not similarly focused on the outcome in state court. We think §2254(d)(2)'s attention to state factual findings on which the state court rested its decision is better explained as an indication that §2254(d)(2) controls cases in which federal courts work only with the evidence in state court and examine what the state court did with that evidence. Judge Chertoff himself acknowledged this "*important* distinction" between §2254(d)(2) and §2254(e)(1): "§2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the 'evidence presented in the state-court proceeding,' while §2254(e)(1) contemplates a

This Court has referred, on occasion, to the "clear and convincing evidence" test in cases in which no additional evidence was received in federal habeas proceedings. Yet in those instances, nothing turned on the interplay between §2254(d)(2) and §2254(e)(1) or on the distinction between them. *E.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (explaining that a state court determination was "wrong to a clear and convincing degree[,] . . . unreasonable as well as erroneous"); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (explaining that a state finding shown to be "incorrect by 'clear and convincing evidence' reflect[ed] an 'unreasonable determination of the facts'") (citation omitted); *see also Miller-El v. Cockrell*, 537 U.S. at 341-48 (referring to both standards in a case implicating only the criteria for a certificate of appealability); *cf. Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (explaining that by concluding that a state determination of fact was unreasonable the court had equally decided that it had been proven incorrect by clear and convincing evidence).

More recently, the Court has expressly reserved decision on the applicability of §2254(e)(1) in cases in which the only evidence is the evidence the state court saw. Writing for a unanimous Court in *Rice v.*

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challenge to the state court's individual factual determinations, including a challenge *based wholly or in part on evidence outside the state trial record*." *Lambert v. Blackwell*, 387 F.3d at 235 (emphasis added).

Collins, 546 U.S. 333 (2006), Justice Kennedy declined to "address" the parties' argument over whether §2254(e)(1) applied to a case not involving new fact-finding in federal court. *Id.* at 338-39. In *Collins*, the result was the same "assuming, *arguendo*, that only §2254(d)(2) applied." *Id.* at 339.

In this case, as in *Miller-El v. Dretke* and *Wiggins*, the evidence in state court demonstrates that the state court's factual determinations were both unreasonable and refuted by clear and convincing evidence. The petitioner's brief explains why this is so.[3] Yet the questions the Court granted certiorari to address draw attention to the relationship between §2254(d)(2) and §2254(e)(1). This *amicus* brief focuses on that relationship.

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[3] For the same reasons, habeas relief would also be available in this case if it were analyzed according to the account of §2254(d)(2) and §2254(e)(1) adopted by the Third Circuit. *See* note 2, *supra*. The petitioner's brief demonstrates that the state court's findings of subsidiary facts were rebutted by clear and convincing evidence and that the state court's conclusions of ultimate fact were unreasonable. For example, the state court disregarded a wealth of credible evidence indicating that experienced counsel made no strategic decision to forgo an investigation of the petitioner's mental retardation.

II. THE COURT OF APPEALS ERRONEOUSLY INJECTED THE "CLEAR AND CONVINCING EVIDENCE" STANDARD APPLICABLE TO CASES GOVERNED BY §2254(e)(1) INTO ITS ASSESSMENT OF THE STATE COURT'S WORK UNDER §2254(d)(2)

Rather than recognizing the complementary functions performed by §2254(d)(2) and §2254(e)(1), the Eleventh Circuit merged these two provisions and, in so doing, misapprehended both. Initially, the court of appeals applied the §2254(e)(1) presumption to state conclusions regarding issues that approach mixed questions of law and fact. Then, it aggravated matters by forcing the §2254(e)(1) "clear and convincing evidence" standard of proof into the §2254(d)(2) question whether the state court's decision against Wood's legal claim was based on an "unreasonable" determinations of the facts.

The Eleventh Circuit recognized that the §2254(e)(1) presumption of correctness applies only to state court determinations of fact. But the court failed to acknowledge that the distinction between issues of fact on the one hand, and legal or mixed issues on the other, is a difficult one to draw, and that borderline questions are properly treated as factual when they turn on credibility choices that the judge who saw the witnesses was in a good position to make. *Thompson v. Keohane*, 516 U.S. 99, 111 (1995) (explaining that this Court applies the presumption to issues beyond "what happened" when "their resolution depends heavily on the trial court's appraisal of witness credibility and demeanor"). The

important issues in this case are whether experienced defense counsel investigated Wood's intellectual capacity in search of evidence to offer in mitigation and then made an informed, strategic decision to forgo presenting the sentencing jury with evidence of mental retardation. Both are borderline questions. The circuit court treated them as matters of fact. But they entail more than a description of historical events, and their resolution does not depend upon the credibility of the witnesses. Wood's argument is not that anyone gave false testimony, but that the state court ignored crucial testimony that was uncontested.[4] Moreover, the state court did not justify its factual conclusions in light of the evidence, but rather adopted wholesale the findings proposed by the state. Even if §2254(e)(1) were applicable to this case, the nature of the important issues and the manner in which the state court arrived at its conclusions regarding those issues would counsel against reliance on §2254(e)(1)'s presumption to defeat the petitioner's claim.[5]

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[4] As the petitioner's brief explains, the evidence actually shows that neither of the experienced attorneys assigned to represent the petitioner (Dozier and Ralph) participated in the decision to conduct no further investigation of his retardation. The attorney who had responsibility for investigating mental retardation for sentencing purposes and failed to act was a third lawyer (Trotter) who had been practicing law for less than a year. See *Wood v. Allen*, 465 1211, 1239-40 (M.D. Ala. 2006).

[5] The account of §2254(d)(2) and §2254(e)(1) adopted by the Third Circuit would treat these key issues as questions of ultimate fact and, thus, would deny any state determinations regarding them the presumption of correctness established for state findings of subsidiary facts. *See* note 2, *supra*.

Proceeding on the premise that §2254(e)(1) figures in this case, the court of appeals next made the very mistake this Court identified in *Miller-El v. Cockrell*, *supra*—namely, requiring a habeas petitioner to prove by clear and convincing evidence that state court determinations of fact were unreasonable. 537 U.S. at 341. The Eleventh Circuit first ascribed two findings of fact to the state court: that "experienced counsel (1) decided calling Dr. Kirkland would not be in Wood's best interest, and (2) decided against presenting mental health evidence." *Wood v. Allen*, 542 F.3d 1281, 1304 (11th Cir. 2008).[6] Next, plainly referring to §2254(d)(2), the court of appeals stated that Wood had "wholly failed to show the state courts made an unreasonable determination of the facts"—presumably those same two facts. *Id.* Then, the Eleventh Circuit dropped a footnote insisting that Wood had "not presented evidence, *much less clear and convincing evidence*, that counsel did not make such decisions about Dr. Kirkland's report and a mental health defense." *Id.* at 1304 n.23 (emphasis added). At that point, the circuit court was plainly referring to §2254(e)(1), where the "clear and convincing evidence" standard is found—thus mixing the standard for showing presumptively correct state findings actually to have been wrong with the "reasonableness" standard the

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[6] These two determinations regarding counsel's thinking about using Dr. Kirkland and his report as part of the defense at trial were not material to the petitioner's constitutional claim that counsel were ineffective for failing to pursue evidence of Wood's mental retardation for use at the sentencing phase and for failing to make an informed, strategic decision about presenting evidence of retardation in mitigation. *See* note 9, *infra*.

court was purporting to apply. Then, confusing things still further, the Eleventh Circuit said that "Wood ha[d] not presented any evidence to rebut the presumption that experienced trial counsel's decision . . . was reasonable. . . . [I]t was Wood's burden to rebut the *presumption of reasonableness* with evidence." *Id.* at 1305 (emphasis added).

In short, the court of appeals erroneously compounded the standards in §2254(d)(2) and §2254(e)(1), piling one on top of the other. There is no statutory presumption that state factual determinations were *reasonable*. Nor is there any statutory requirement that a habeas petitioner must rebut such a presumption by clear and convincing evidence. As this Court explained in *Miller-El*, the "clear and convincing evidence" standard applies when a state factual determination is entitled to the presumption established by §2254(e)(1) and a habeas petitioner can succeed only by proving that the determination was nonetheless *erroneous*. Nothing in §2254(e)(1) or in §2254(d)(2) imposes the same demanding evidentiary standard when the question is whether a state factual determination was unreasonable for purposes of §2254(d)(2). Congress has required a petitioner to adduce clear and convincing evidence to prove that factual findings that are presumed to be correct were actually wrong, but Congress has not required a petitioner to produce clear and convincing evidence that a state factual finding was unreasonable.

III. THE COURT OF APPEALS ERRONEOUSLY INVOKED THE §2254(e)(1) PRESUMPTION OF CORRECTNESS IN FAVOR OF STATE FACTUAL DETERMINATIONS WITHOUT REGARD TO WHETHER THE STATE FINDINGS WERE REASONABLE

The circuit court's basic mistake was thinking that §2254(e)(1) is implicated in this case at all. As Judge Kozinski has pointed out, §2254(d)(2) is groomed for cases involving only the existing state record, while §2254(e)(1) is concerned with cases in which federal habeas courts take new evidence that was not presented in state court. *Taylor v. Maddox*, 366 F.3d at 999-1001. This fundamental division of labor explains why §2254(d)(2) focuses a federal court's attention on the evidence available to the state court, while §2254(e)(1) does not. In this case, of course, Wood contends that he is entitled to federal habeas relief on the basis of the state court record as it stands. The controlling statutory provision is therefore §2254(d)(2).

Petitioners can win federal relief by exposing weaknesses in the evidentiary basis of a state court's judgment. Not only does §2254(d)(2) invite petitioners to show that state determinations of fact were unreasonable, but §2254(f) provides for calling up the transcript of the state court proceeding if an applicant "challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein." Plainly, the framework Congress has established for handling fact-sensitive cases includes, as one of its core elements, a federal court's

assessment of the extant state record to determine whether, in light of the evidence presented in state court, the state court's determinations of fact were reasonable. This assessment is guided by §2254(d)(2).[7]

Applying §2254(d)(2), the court of appeals should have examined the factual determinations made in state court to decide whether they were reasonable, given the evidence in the state record. Specifically, the court should have considered familiar ways in which the state court may have reached factual determinations unreasonably. For example, the state court may have employed defective process, applied an erroneous legal standard, relied on insufficient evidence, or, as here, disregarded evidence supporting different conclusions. *Taylor v. Maddox*, 366 F.3d at 999-1001. Instead, the Eleventh Circuit jumped the gun and brought §2254(e)(1) into play immediately—insisting that the petitioner failed to disprove state factual findings by "clear and convincing" evidence contained in the existing state record. *Wood*, 542 F.3d at 1304 n.23. The Eleventh Circuit thus treated this case as though it involved an attempt by the petitioner to controvert state factual determinations on the basis of new evidence introduced in federal proceedings.

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[7] *See Lambert v. Blackwell*, 387 F.3d at 236 n.19 (explaining that the "(d)(2) inquiry would come first" where the dispositive question in federal habeas is whether the state court's decision was independently based on reasonably-determined ultimate facts).

The court of appeals failed to recognize that §2254(d)(2) and §2254(e)(1) have separate roles to play in a single, integrated framework in which the meaning of one provision must necessarily account for the other. Section §2254(e)(1) does not direct a federal habeas court to presume the accuracy of state factual determinations at the outset of its analysis, blinding itself to the process by which the state court reached its findings and the evidentiary support the findings enjoyed. If §2254(e)(1) did that, it would render superfluous the clear contemplation in §2254(d)(2) that state determinations of fact defeat federal relief only if they were reasonable in view of the evidence in state court. The presumption in §2254(e)(1) presupposes that the findings in question were reached via fair procedural arrangements and on the basis of adequate evidence—that is, that they were reached reasonably. The presumption is therefore triggered only after the §2254(d)(2) analysis is complete. Then, §2254(e)(1) requires a petitioner to carry the heavy burden of dislodging state findings that were reasonable in light of the evidence in state court alone—by presenting the federal court with evidence the state court did not see.

Reading §2254(d)(2) and §2254(e)(1) to be coordinated in this way makes sense of these two provisions as a package. It is also efficient. In most cases, including this one, petitioners seek federal habeas relief on the basis of the evidence as it was developed in state court. The argument is not that the state court failed to consider other evidence offered for the first time in federal court, but that the

state court failed reasonably to determine the facts in light of the evidence presented in state court. The very point of §2254(f) is to produce the relevant state court transcript so that a federal court can evaluate a petitioner's challenge to the adequacy of the state court's fact-finding process and the sufficiency of the evidence underlying the state court's conclusions. It only makes sense, accordingly, that a federal court faced with an argument grounded in the state court record should address that argument under §2254(d)(2), which is tailored for a federal decision on whether habeas relief is barred in view of a previous state court judgment against the prisoner, based on a reasonable determination of the facts on the evidence presented.

It equally makes sense that a federal court should turn to §2254(e)(1) if it decides that §2254(d)(2) bars relief in view of the state record as it stands and the question becomes whether the petitioner can succeed by offering supplementary evidence in federal court. By hypothesis, the federal court has concluded that the state court's decision on the merits was based on a reasonable determination of the facts in light of the record in state court. The state findings are therefore entitled to respect—which, again, can take the form of the §2254(e)(1) presumption of accuracy and the demanding "clear and convincing evidence" standard for new evidence in rebuttal.

The quite different approach reflected in the decision below makes little sense. The Eleventh Circuit court appears to have read §2254(e)(1) in isolation from §2254(d)(2) and conceived that all

state court findings of fact must be presumed correct—no questions asked. That approach reads the §2254(d)(2) inquiry into the reasonableness of the state court's factual determinations out of the equation. Once the §2254(e)(1) presumption is triggered, it can be rebutted only with clear and convincing evidence. If a petitioner meets that elevated standard on the basis of the extant state court record, he also demonstrates that the state court's decision rested on an unreasonable determination of the facts—thus obviating an independent examination of reasonableness under §2254(d)(2). If the petitioner cannot disprove state factual determinations on the basis of clear and convincing evidence that was before the state court, and must adduce new evidence in federal court, then again §2254(d)(2) becomes superfluous inasmuch as §2254(d)(2) is addressed exclusively to what the state court did with the evidence it had at the time.

To summarize, in a case like this one, in which a petitioner contends that the extant state record demonstrates an entitlement to habeas relief, a federal habeas court must initially consider familiar ways in which the state court may have reached an unreasonable determination of the facts, working with the evidence before it. If the federal court concludes that the state court's decision *was* based on an unreasonable determination of the facts in light of the evidence the state court received, §2254(d)(2) does not mandate deference to the state court's judgment. The federal court will then adjudicate the merits of the claim *de novo*. *E.g.*, *Miller-El v. Dretke*, 545 U.S. at 266 (ultimately

ordering that judgment for the petitioner should be entered); *cf. Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769, 1784 (2009) (treating the merits of a claim *de novo* because a state court had not triggered §2254(d) by adjudicating the merits previously). If the federal habeas court concludes that the state court's decision was *not* based on an unreasonable determination of the facts in view of the state court record, that conclusion will be dispositive—if the petitioner has no supplementary evidence to offer in federal court.

In this case, the state court decision rejecting petitioner's Sixth Amendment claim was based on an unreasonable determination of the facts within the meaning of §2254(d)(2). Accordingly, the circuit court should not have ruled that habeas relief is foreclosed and, instead, should have addressed the merits of the claim independently.

This coordinated understanding of §2254(d)(2) and §2254(e)(1) does not marginalize the presumption of correctness in §2254(e)(1). The presumption functions as an important brake on federal judicial authority in cases in which petitioners can succeed only by introducing new evidence in federal court. It is true that federal hearings are rare and that §2254(e)(2) bars hearings when petitioners failed to develop facts in state court. See *Michael Williams*, 529 U.S. at 429-30. But federal hearings are held in some instances, and when they are the presumption ensures that federal courts will extend deference to state factual determinations made (reasonably) on the basis of the state court record.

In the interest of completeness, it bears mention that if a federal habeas court receives additional evidence and finds additional facts, the court may rely on those findings in reaching judgments on the merits of the petitioner's claim and on the availability of federal habeas relief. This is the territory in which §2254(e)(1) operates, and, of course, §2254(e)(1) does not limit a federal court's attention to the existing state record. Thus the federal court may expand the body of evidence beyond what was available to the state court. This Court has recognized lower court decisions holding that §2254(d)(2) does not restrict a federal court to the evidence in state court if the federal court makes additional factual determinations consistent with §2254(e)(1) and (2). *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (*per curiam*).[8]

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[8] *Cf. Wiggins*, 539 U.S. at 531 (addressing a factual issue *de novo* when the state court had made no finding regarding the issue to which a federal habeas court might defer). This interpretation of §2254(d)(2) is not inconsistent with *Schriro v. Landrigan*, 550 U.S. 465 (2007), where this Court recognized that the limits on habeas relief imposed by §2254(d) inform a federal court's decision on whether to hold a federal hearing in the first place. The Court explained in *Landrigan* that a district court has discretion to deny a hearing if the facts a petitioner seeks to prove would not entitle him to relief. But the Court did not suggest that §2254(d)(2)'s reference to the evidence in state court routinely makes it futile for federal courts to gather additional evidence. A federal hearing was unnecessary in *Landrigan* itself—not because it is useless to expand the state record in any case, but because, in that instance, the state court had concluded that the prisoner would not have permitted his attorney to introduce evidence going to the facts the prisoner later sought to demonstrate. Since that state court conclusion was not an unreasonable determination of the facts within the

IV. THE COURT OF APPEALS ERRONEOUSLY HELD THAT FEDERAL RELIEF IS BARRED IN VIEW OF STATE FACTUAL DETERMINATIONS THAT DID NOT FORM THE BASIS OF THE STATE COURT'S DECISION ON THE MERITS

The court of appeals made yet another vital mistake by failing to appreciate that §2254(d)(2) is concerned exclusively with state factual determinations on which the state court "based" its "decision" on the merits of a petitioner's legal claim. The state court may reasonably have determined factual issues that were not material to its decision. But immaterial facts have no significance. Section 2254(d)(2) permits the award of federal habeas relief if the state court actually grounded its decision on unreasonable factual determinations.

The circuit court ascribed various factual determinations to the state court, concluded that those findings were reasonable, and then jumped to the conclusion that §2254(d)(2) must foreclose federal relief. Yet the factual determinations that mattered, that is, the factual determinations that were actually essential to the state court's decision, were contradicted by overwhelming evidence presented in state court. Since those crucial determinations were unreasonable, §2254(d)(2) does not defeat federal habeas relief in this case.

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meaning of §2254(d)(2), the federal district court had no obligation to hold its own hearing to examine evidence that would not have changed the result. *Landrigan*, 550 U.S. at 481.

Perhaps the most vivid examples are the state court findings that defense counsel made strategic decisions not to call Dr. Kirkland as a witness and not to introduce his report into evidence. The court of appeals concluded that those findings were reasonable, because of the risk that damaging information about the petitioner's criminal history would come out. The petitioner disputes the evidence that counsel genuinely made any such strategic decisions. Yet even assuming *arguendo* that the state court findings in these respects were reasonable, it makes no difference. The state court's decision on the merits of Wood's Sixth Amendment claim was not "based" (and could not have been based) on findings regarding Dr. Kirkland and his report.

As the district court explained, Dr. Kirkland interviewed Wood regarding matters relevant to the guilt phase of state proceedings—specifically, to determine whether Wood was competent to stand trial and whether he could form the mental state required for capital murder. Kirkland's report focused on those matters. *Wood*, 465 F.Supp.2d at 1240. Wood's Sixth Amendment claim, however, is that counsel did not develop evidence of mental retardation as a basis for avoiding a death sentence at the penalty phase.[9] Wood's argument is not that

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[9] Despite implications to the contrary in the Eleventh Circuit's opinion, the petitioner has never claimed that his attorneys were ineffective for failing to call Dr. Kirkland as a witness or failing to introduce his report into evidence. *See* J.A. 235-39 (Second Amended Petition 228-36 stating the Sixth Amendment claim solely as the contention that counsel were ineffective for failing to develop further evidence of mental retardation); Post

failing to use Kirkland himself or his report amounted to ineffective assistance, but that defense counsel were ineffective in failing to pursue and present other evidence that might well have produced a life sentence. Wood relies on Kirkland's report only insofar as it alerted counsel to the possible existence of that different evidence. The state factual determinations that matter for purposes of §2254(d)(2) in this case are the findings on which the state court grounded its decision that counsel made an informed, strategic decision not to develop and offer evidence of mental retardation to the sentencing jury. The district court correctly concluded that the state findings on those points were unreasonable, given the powerful evidence in the record looking the other way.

The focus in §2254(d)(2) on the material facts can work against some applicants for federal habeas relief. If a state court reached unreasonable factual determinations that did not form the basis of the state court's decision, §2254(d)(2) may still forestall the federal habeas remedy—provided that the state decision was independently based on a reasonable determination of *material* facts.[10] If, for example, a

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Hearing Brief on Rule 32 Petition at 76 (stating that "Trial Counsel's Performance was Deficient for Failing to Develop Evidence of Mr. Wood's Mental Retardation and Mental Disability"); *id.* at 76-82 (developing the claim in these terms only). Thus, any state findings concerning counsel's reasons for not introducing Dr. Kirkland's testimony and report—reasonable or not—were immaterial to whether counsel made a strategic decision to forgo a thorough investigation of the petitioner's mental retardation for sentencing purposes.

[10] If §2254(d)(2) does bar federal relief with respect to the state

state court unreasonably determined the facts underlying a conclusion that a suspect was not in custody for purposes of *Miranda* at the time he was interrogated, §2254(d)(2) may nonetheless foreclose federal relief if the state court actually based its decision rejecting a *Miranda* claim on reasonable determinations of other facts—e.g., facts fortifying conclusions that the suspect was informed of his rights and freely waived them.[11]

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record alone, §2254(e)(1) mandates the presumption in favor of the state court's reasonable findings, if and when the petitioner offers additional evidence in federal court. The petitioner then can succeed by proving that the state findings were erroneous (even if they were reasonable in light of the more limited evidence the state court received).

[11] Judge Chertoff recognized this point (in substance) in *Lambert v. Blackwell, supra*. He explained that even if a district court makes "subsidiary decisions" sustaining a petitioner's challenges to specific state factual determinations, "the *remaining record* might still uphold the state court's decision under the overarching standard of (d)(2)." 387 F.3d at 236 n.19 (emphasis added). Judge Chertoff contemplated that a petitioner's attack on state findings of subsidiary facts would be analyzed under §2254(e)(1), that is, by presuming them to be correct but rebuttable by clear and convincing evidence. Yet the point he was making is stronger once it is understood that §2254(d)(2) provides the exclusive analysis for cases in which the only evidence is what was developed in state court. Even *unreasonably* erroneous state factual determinations make no difference if the state court's decision on the merits of a claim rested independently on other, reasonably-determined, material facts.

V. THE ABSENCE OF EXPRESS CONDITIONS ON THE PRESUMPTION IN §2254(e)(1) DOES NOT FORECLOSE AN EXAMINATION OF A STATE COURT'S FACT-FINDING ARRANGEMENTS PURSUANT TO §2254(d)(2)

There are two related arguments for the notion that §2254(e)(1) forces a federal habeas court to presume that all state factual determinations were correct without question. One is that no conditions requiring regular process and sufficient evidence are expressly stated and that it must be inferred from legislative silence that Congress meant to establish a blanket presumption without regard for the infirmities of state fact-finding arrangements. The other is that the version of §2254(e)(1) that was in place prior to AEDPA contained express conditions and that it must be inferred from the failure to carry those conditions forward explicitly that Congress meant to abandon all conditions. Neither of these arguments is sound.

Both arguments depend on canons of statutory construction that provide only rough guidance toward identifying the genuine meaning of what Congress has done, and that can be refuted by contrary indications. *Cf. Clay v. United States*, 537 U.S. 522 (2003) (declining to take the omission of an explicit reference to the definition of finality to imply a rejection of that definition).

Other statutes governing federal court adjudication in the wake of state court action contain no express conditions, but nonetheless contemplate that federal courts will hold state court results up to

familiar conventions of regularity. The Full Faith and Credit Statute, 28 U.S.C. §1738, generally requires a federal court to give a previous judgment in state court the preclusive effect the judgment would have under state law. That statute does not explicitly say that the state judgment must have been reached in any particular way, but this Court has "repeatedly recognized" that "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980), *citing Montana v. United States*, 440 U.S. 147, 153 (1979).[12]

The classic precedent is *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874), where it was argued that Congress had conferred jurisdiction on this Court to overturn state court decisions on state law issues merely by enacting a jurisdictional provision that omitted an express limitation to federal issues. The Court rejected any such inference both because it conflicted with other aspects of the same Act and because it would have generated extraordinary consequences that could not be ascribed to Congress by negative implication.

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[12] In a like manner, this Court does not read 28 U.S.C. §1257 always to foreclose this Court's jurisdiction to review state court judgments based on independent state grounds. State-law decisions lacking "fair or substantial support" are inadequate to cut off appellate review. *Ward v. Bd. of County Commr's of Love County*, 253 U.S. 17, 22 (1920).

In this instance, the notion that §2254(e)(1) implicitly bars a federal court from looking behind a state determination of fact is squarely contradicted by §2254(d)(2), which explicitly requires the court to investigate state findings to determine whether they were reasonable. So far from *forbidding* a federal court to judge whether state findings were reasonable, these statutes *require* the court to make that very judgment. When Congress omitted the express conditions on the presumption of correctness that prior law contained, it did not vanquish a federal court's ordinary responsibility to ensure that federal adjudication proceeds on the basis of facts that were forged in a procedurally adequate way and were anchored in sufficient evidence. Congress simultaneously enacted §2254(d)(2), which expressly directs a federal court's attention to the *bona fides* of state fact-finding.[13]

And small wonder. The conditions in the prior statute were demonstrably verbose and unclear. There was considerable confusion, for example, about the relationship between the standards for invoking the presumption and the criteria for holding federal hearings. *See* Hart & Wechsler, The Federal Courts

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[13] Judge Chertoff suggested in *Lambert v. Blackwell*, *supra*, that the effect of a blanket presumption may be mitigated by taking irregularities in state fact-finding process into account in determining whether the state court's factual determinations were reasonable within the meaning of §2254(d)(2). 387 F.3d at 239. The far simpler and straightforward answer is that the presumption is triggered only with respect to state findings found to be reasonable in light of the evidence in state court—an approach Judge Chertoff also acknowledged. *See* note 2, *supra*.

and the Federal System 1564 (3d ed. 1988). By dropping express statutory conditions from §2254(e)(1), and substituting the "reasonableness" standard in §2254(d)(2), Congress merely streamlined the statutory mandate that a federal habeas court can give effect to state factual determinations only if they were generated reasonably.

This understanding of §2254(d)(2) and §2254(e)(1) as a package not only conforms to the express language in each of these complementary provisions, but also avoids the perverse results that would follow from reading the presumption in §2254(e)(1) to thwart the inquiry into reasonableness in §2254(d)(2). Construing §2254(e)(1) to mandate a presumption in favor of state findings without question would be inconsistent with the whole thrust of AEDPA, of which §2254(e)(1) was a part. The core purpose of §2254(d) was to ensure that federal courts respect *reasonable* state court actions on federal questions. *Terry Williams v. Taylor*, 529 U.S. 362, 411 (2000).

Reading the §2254(e)(1) presumption to be unconditional would not only defeat Congress' purpose, it would unnecessarily put Congress at odds with the Suspension Clause. This Court confirmed in *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229 (2008), that the Suspension Clause "remains applicable and the writ relevant . . . even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights." Id. at 2270. Speaking directly to existing statutes regarding federal attention to the facts

facts underlying petitioners' claims, the Court explained that limits on fact-finding in federal habeas proceedings may be appropriate "where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims" in state court. *Id.* at ___, 2273. If §2254(e)(1) were read to require federal courts to presume state factual determinations to be correct in the absence of a "full and fair opportunity" to develop the facts in state court, at the very least the Court would have to face the question whether such an extraordinary policy would be constitutional. To avoid that issue, the Court should construe the silence in §2254(e)(1) to allow federal courts to conduct the inquiry called for by §2254(d)(2).

CONCLUSION

In this case, the petitioner contends that he was denied effective assistance of counsel at the sentencing phase of state court proceedings and that §2254(d)(2) does not bar federal relief in light of the unfavorable judgment on that claim reached by the state courts in Alabama. The applicable analytic framework contemplated by AEDPA and this Court's precedents calls for an examination of the evidence presented in state court to decide whether the factual determinations on which the state court decision rested were unreasonable. The petitioner's brief amply shows that the state court decision *was* based on an unreasonable determination of the material facts. The Eleventh Circuit erroneously concluded otherwise, and its judgment that §2254(d)(2) forecloses federal habeas relief should be reversed.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HOLLY WOOD,

Petitioner,

vs.

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Under 28 U. S. C. § 2254(d)(2), did the Alabama state courts base their rejection of Wood's ineffective assistance claim upon an unreasonable factual determination that Wood's trial counsel consciously chose to end their mental health investigation with the Kirkland Report and not to present any evidence contained within the report to the penalty phase jury?

2. Did the Court of Appeals err by applying 28 U. S. C. § 2254(e)(1)'s presumption of correctness to the state court's factual findings when Wood's § 2254(d)(2) claim was based solely on the state court record?

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IN THE

Supreme Court of the United States

HOLLY WOOD,

Petitioner,

vs.

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the petitioner seeks to water down the protections for reasonable state court judgments enacted by Congress in the Antiterrorism and Effective Death Penalty Act of 1996. Such a weakening of this important law would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts and history of the cases are described in detail in the Brief for Respondents at pages 3-21. We summarize them here to frame the issues discussed in this brief. Sixteen years ago Holly Wood crept into his former girlfriend's bedroom as she slept and shot Ruby Gosha in the head with a 12-gauge shotgun. See *Wood* v. *State*, 715 So. 2d 812, 813-814 (Ala. Crim. App. 1996). He told his cousin, who was waiting outside in his truck, "I shot that bitch in the head, and [blew] her brains out and all she did was wiggle." *Id.*, at 815.

Wood previously shot another former girlfriend, Barbara Siler, through the window of her home. *Wood* v. *Allen* (*Wood III*), 542 F. 3d 1281, 1284, 1295-1296 (CA11 2008). He was on parole for that violent felony when he murdered Ruby. *Ibid.*

Wood was assigned three attorneys to handle his defense. *Wood III*, 542 F. 3d, at 1289. Two of his attorneys, Carey Dozier and Frank Ralph, were experienced capital defense attorneys. J. A. 143; *Wood III*, *supra*, at 1289, 1291. The third attorney, Kenneth Trotter, had recently been admitted to the bar. *Id.*, at 1292.

The jury unanimously convicted Wood of capital murder during a first-degree burglary. *Id.*, at 1284.

Part of the defense preparation was review of a psychological report prepared by Dr. Karl Kirkland.

App. to Brief for Respondents in Opposition to the Petition for Writ of Certiorari ("Resp. App.") 50. Dozier had initially reviewed Dr. Kirkland's report and decided nothing in it required further inquiry. *Ibid.*; see also *Wood III*, 542 F. 3d, at 1293-1294. When Trotter asked if a second report was necessary, Dozier again examined Dr. Kirkland's report and concluded that "nothing in that report merited further investigation." Resp. App. 51.

During the penalty phase, the State sought to call Barbara Siler, the victim of Wood's prior assault conviction. *Wood III*, 542 F. 3d, at 1295. Trotter successfully objected to her testimony as unduly prejudicial. *Ibid.* Trotter also called Wood's father and sisters as mitigating witnesses. J. A. 25, 27-53. They testified Wood was a good son, good brother, and Wood was "a leader" who took care of his siblings. J. A. 26, 33-35, 38. Finally, Trotter called the Pardons and Paroles clerk to establish that Wood was drinking at the time of arrest. *Wood III, supra*, at 1296. Trotter asked the jury to treat Wood's alcohol consumption as a mitigating factor. *Id.*, at 1297. The jury recommended a sentence of death by a vote of 10 to 2. *Ibid.*

Defense counsel chose not to disclose Dr. Kirkland's report to the jury. *Wood III*, 542 F. 3d, at 1295. The report was not disclosed because it contained harmful evidence that Wood "felt injurious toward others in the past," *id.*, at 1290, and refuted his claim that he had not been drinking the day of the murder. See *id.*, at 1305.

The trial judge held a sentencing hearing one month later and reviewed Dr. Kirkland's psychological evaluation. *Wood III*, 542 F. 3d, at 1297-1298. The judge imposed a death sentence, noting that "[t]he defendant asked the Court to consider an outpatient forensic evaluation report that was submitted by Karl Kirkland." J. A. 92. That report

> "shows that the defendant is functioning in the borderline range of intellect. The report also indicates that the defendant does not have a mental disorder present that would detract from his ability to appreciate the criminality of his behavior with regard to this specific alleged offense. The report also indicates that the defendant was 'quite willing to discuss the lack of drugs or alcohol on the day of the offense.' " J. A. 92-93.

The trial judge found three aggravating factors and no mitigating factors. *Wood III*, 542 F. 3d, at 1298.

Wood's sentence was affirmed on direct appeal, and Wood filed a petition for state postconviction review. *Wood III*, 542 F. 3d, at 1299. Three evidentiary hearings were held between 2000 and 2003. *Ibid.* Wood's family, teachers, his former girlfriend, and several psychiatrists all testified. *Id.*, at 1285-1288, 1289-1294. Based on Wood's evidence, the state postconviction court found Wood was not mentally retarded "because Wood clearly has failed to establish that he has significant or substantial deficits in his adaptive functioning." Resp. App. 14; see also *Wood III*, *supra*, at 1286, n. 3. It also determined that Wood's counsel was not ineffective. Resp. App. 36.

Wood then filed a petition for relief under 28 U. S. C. § 2254. *Wood III*, 542 F. 3d, at 1285. The district court agreed that Wood was not mentally retarded but found counsel ineffective at the penalty phase because they had failed to produce evidence of Wood's "borderline range of intellectual functioning." *Wood* v. *Allen*, 465 F. Supp. 2d 1211, 1243 (M.D. Ala. 2006). The Eleventh Circuit affirmed the district court's *Atkins* and *Batson* holdings, but reversed the ineffective assistance of counsel holding. *Wood III*, 542 F. 3d, at 1314.

This Court granted certiorari on May 18, 2009. *Wood* v. *Allen*, 129 S. Ct. 2389, 173 L. Ed. 2d 1291 (2009).

SUMMARY OF ARGUMENT

The habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) were the product of a compromise intended to preserve habeas corpus as a remedy for clearly wrong state court decisions while eliminating the use of the writ as another appeal to second-guess the state courts on debatable questions. As a part of this compromise, Congress enacted 28 U. S. C. § 2254(d) as an independent ground for rejecting a collateral attack on a final state judgment. This subsection is independent of other requirements for habeas relief, including § 2254(e)(1). Both provisions should be applied according to their terms, neither excluding the other.

To expedite processing of habeas cases, Congress's main goal is enacting AEDPA, § 2254(d) should be applied first, based solely on the state court record, to dispose of any claims barred by this subsection. For any claims that survive this initial review, either because one of the two numbered exceptions applies or because there is no state court decision on the merits to invoke subsection (d), § 2254(e)(1) attaches a presumption of correctness to any relevant state court findings. The findings to which § 2254(e)(1) applies may have been made in deciding the claim before the federal habeas court or some other issue in the case.

In cases where there is no additional evidence produced in federal court, the "unreasonable determination" standard of § 2254(d)(2) and the "clear and convincing" standard of § 2254(e)(1) are essentially equivalent and will typically point to the same result.

The Court of Appeals in this case correctly applied the § 2254(d)(2) standard. Its passing reference to "clear and convincing" was merely imprecise phrasing, not important to the opinion.

The present case illustrates how the unlimited mitigation rule of *Lockett* v. *Ohio*, combined with *Rompilla* v. *Beard*'s expansion of the duty to investigate mitigation, provides unlimited ammunition to attack the adequacy of the defense in every capital case. Trial counsel for Wood made a reasonable decision regarding the scope of their investigation, considering the limited resources available. If the Court addresses the merits of part I of Petitioner's Brief, it should disavow any implication in *Rompilla* that counsel cannot focus their investigation in this manner.

Amicus NACDL contends that a decision should receive less deference and greater scrutiny when the trial judge adopts findings prepared by the prevailing party. This contention is flatly contradicted by the very precedent of this Court that they cite, *Anderson* v. *Bessemer City*.

ARGUMENT

I. Section 2254(d) creates an independent condition on habeas relief, not a substitute for any other condition.

Much of the complexity in the law of habeas corpus arises from the need to strike a "careful balance," between "protect[ing] the State's sovereign interest in punishing offenders and its good faith attempts to honor constitutional rights, . . . while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged." *Calderon* v. *Coleman*, 525 U. S. 141, 146 (1998) (*per curiam*)

(citations and internal quotation marks omitted). The push and pull of those competing considerations through various court decisions and legislative enactments has caused the remedy to wander a wavering line. Congress enacted AEDPA because it believed the balance had tilted too far in the petitioners' favor, see 141 Cong. Rec. 15062, col. 2 (1995) (statement of Sen. Hatch), but it did not wish to abolish federal habeas for state prisoners altogether. Hammered-out compromises are more complex than single-minded, sweeping pronouncements, but solution of the puzzle is aided by keeping in mind what Congress wanted to change and what it wanted to keep.

The nature of the compromise can be seen in the amendments proposed by Senators Kyl and Biden as AEDPA was being debated. Senator Kyl proposed language similar to the District of Columbia statute in *Swain* v. *Pressley*, 430 U. S. 372 (1977). That amendment would have largely eliminated federal habeas review for state prisoners. See 141 Cong. Rec. 15045, cols. 2-3 (1995). Senator Biden would have deleted the "deference" standard to "allow[] the current practice of independent review by the court." 141 Cong. Rec. 15058, col. 1 (1995). The Senate rejected both amendments, and adopted "a carefully crafted compromise" with AEDPA's current standard. 141 Cong. Rec. 15064, col. 1 (1995) (statement of Sen. Specter). The compromise standard was intended to allow federal courts to correct *clearly* wrong state court decisions while forbidding the use of habeas corpus to second-guess state judgments on debatable questions, which was the effect of the *de novo* standard of review. See *id.*, at 15062, col. 3 (statement of Sen. Hatch).

To accomplish this goal, Congress decided to keep federal habeas review of state decisions but erect some new hurdles for petitioner to clear, raise the height of

some existing ones, and leave other existing hurdles in place. Foremost among the new hurdles is § 2254(d). That subsection bars habeas corpus relief for any claim adjudicated on the merits in a state court proceeding unless the lower court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(1)-(2). Although often referred to as a "deference" standard, this subsection actually creates a modified rule of *res judicata*. See Scheidegger, Habeas Corpus and the Legislative Power, 98 Colum. L. Rev. 888, 931-932 (1998); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 9-13 ("CJLF *Bell* Brief").[2]

At the same time, Congress raised the bar of the hurdle in former subdivision (d). Prior to AEDPA's revisions, the habeas corpus statute "bore an obvious resemblance to the list of guidelines in *Townsend* v. *Sain*, [372 U. S. 293 (1963).]" 17B C. Wright, A. Miller, E. Cooper, & V. Amar, Federal Practice and Procedure § 4265.1, p. 319 (3d ed. 2007). Six of the itemized hurdles to habeas relief addressed situations where a federal evidentiary hearing was mandatory. *Id.*, at 321. In six of the eight situations, a habeas petitioner was almost assured a second appeal in federal court. Congress sought to reduce the delay this created, see Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 9 (1995), and fashioned AEDPA to implement its goal to limit habeas review.

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2. All prior CJLF briefs cited in this brief are available at http://www.cjlf.org/briefs/briefmain.html.

141 Cong. Rec. 15095, col. 2 (1995) (statement of Sen. Dole).

Section 2254(e)(1) is the replacement for subdivision (d) of the pre-AEDPA habeas statute. The revision increased the strength of former § 2254(d)'s presumption of correctness for state court findings of fact, eliminating the list of exceptions in favor of a single, simple requirement to present clear and convincing evidence rebutting the presumption. A strikeout/italics version of § 2254, showing the changes, is attached as an appendix to this brief. Congress intended the burden to be high. The burden was necessary because the pre-trial 1996 "habeas system ha[d] robbed the State criminal justice system of any sense of finality and [was] prolong[ing] the pain and agony faced by families of murder victims." 141 Cong. Rec. 14533, col. 2 (1995) (statement of Sen. Thurmond). Tightening the standards was necessary "to restore public confidence and ensure accountability to America's criminal justice system." *Ibid.*

The new hurdle erected by § 2254(d) does not replace any old ones. For example, after AEDPA, some commentators claimed that § 2254(d)(1) had displaced the retroactivity doctrine of *Teague* v. *Lane*, 489 U. S. 288 (1989). See, *e.g.*, Yackle, A Primer on The New Habeas Corpus Statute, 44 Buff. L. Rev. 381, 385 (1996). That was not correct. *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) (*per curiam*), clarified that "the AEDPA and *Teague* inquiries are distinct." While it is generally true that a state court's rejection of a rule that is "new" for *Teague* purposes is also protected by the § 2254(d)(1) standard, this is not always the case, and both requirements continue to have independent force. See *ibid.* Similarly, § 2254(d)(2) is not mutually exclusive with any of the other conditions on habeas relief. As Respondents correctly note, new § 2254(d) does not

incorporate any of the limitations on the presumption of correctness repealed from former § 2254(d), now § 2254(e)(1). See Brief for Respondents 33.[3]

AEDPA provided three key limits on relitigation: § 2244(b)'s gate against successive petitions; § 2254(d)'s limit on relitigation of state court determinations of the merits; and § 2254(e)(1)'s requirement that in a federal hearing petitioner rebut the presumption the state court factual determinations were correct. All three provisions make it more difficult to use a habeas petition to "do over" a prior determination. None of the provisions is a nullity, and none is a substitute for another. Each applies to a specific stage of review, and the petitioner must clear all before he may obtain relief.

II. Section 2254(e)(1) applies to every case that survives § 2254(d).

Petitioner and a supporting *amicus* rely on *Taylor* v. *Maddox*, 366 F. 3d 992 (CA9 2004), for the proposition that § 2254(d)(2) and § 2254(e)(1) are independent and that only one or the other applies when a particular factual finding is reviewed on federal habeas. See Brief for Petitioner 38-39; Brief for American Civil Liberties Union, *et al.* ("ACLU Brief") 6-7. They are correct on the first point but mistaken on the second. Their claim that this either/or interpretation is necessary to avoid rendering either subsection superfluous is also mistaken.

Amicus ACLU contends, "Section 2254(d)(2) deals with cases (like this one) in which no additional evi-

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3. CJLF disagrees with Respondents regarding the order in which a habeas court should normally apply these subsections, but we agree on the more important point of when they apply.

dence is introduced in federal court . . . ." ACLU Brief 7. That is close but not quite right. The section by its terms requires the federal habeas court to judge the reasonableness of the state court's factual findings "in light of the evidence presented in the State court proceeding," *i.e.*, solely on the state court record. Section 2254(d)(2) applies to every claim decided on the merits by the state court. Any additional evidence presented to the federal court is irrelevant to the question § 2254(d) directs the federal court to decide.

In our brief in *McDaniel* v. *Brown*, No. 08-559, at pages 8-19 ("CJLF *Brown* Brief"), we explain why the determination under § 2254(d)(1) should also be decided on the state court record. If the petitioner has not qualified for an exception under clause (1) or (2), then the language at the top of § 2254(d) forbids a grant of habeas relief on that claim. See 141 Cong. Rec. 15058, cols. 1-2 (1995) (statement of Sen. Biden). There is no need to ask whether the petitioner can meet the "clear and convincing" standard of § 2254(e)(1) because that question is moot. The habeas court must "decline to examine further into the merits because they have already been decided against the petitioner" by the state court. See CJLF *Brown* Brief 8-9 (quoting *Darr* v. *Burford*, 339 U. S. 200, 215 (1950)). Denial of a claim under subdivision (d) not only makes an evidentiary hearing unnecessary, it also makes discovery unnecessary. An issue that can and must be decided solely on the state court record can be decided promptly after the filing of the petition and response. Disposing of the bulk of claims this way, thereby winnowing the case to the very few issues where new factual determinations in federal court are necessary and proper, will implement the purpose of Congress to expedite habeas review of capital cases. See *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000); CJLF *Bell* Brief 5.

Amicus ACLU contends at page 8,

> "If the state court's decision on the merits was *not* based on an unreasonable determination of the facts, the state decision is entitled to deference on the existing state court record, barring any independent error of law. Section 2254(e)(1) then comes into play and directs the federal court to presume that the facts the state court reasonably determined are correct."

It is important to be clear here. In this scenario, "Section 2254(e)(1) . . . comes into play" only *if* petitioner has succeeded establishing the exception under § 2254(d)(1). If neither the (d)(1) nor the (d)(2) exception applies, § 2254(e)(1) does not "come into play" *because the case is over*, at least as to this claim.

Only when and if § 2254(d)'s hurdle is cleared or avoided does a federal court need to apply § 2254(e)(1) to a "determination of a factual issue." This is not limited to factual determinations made in the course of deciding the same claim that petitioner makes in federal court. Although the exhaustion and procedural default rules generally require the petitioner to make the claim to state courts in order to receive a federal determination on the merits, that requirement is not airtight. A claim that is procedurally defaulted in state court may still be considered by a federal habeas court if the court finds the state ground inadequate, see *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002), or not independent, *Park* v. *California*, 202 F. 3d 1146, 1151 (CA9 2000), *cert. denied*, 531 U. S. 918 (2000), if the petitioner meets the "cause and prejudice" test, see *Strickler* v. *Greene*, 527 U. S. 263, 289 (1999), or in extremely rare cases if there has been a miscarriage of justice. See

House v. *Bell*, 547 U. S. 518 (2006).[4] In these cases, § 2254(d) would not apply because there has been no state court decision on the merits.

However, a state court may have made factual findings that are relevant to the defaulted federal habeas claim while deciding another claim. For example, if a California judge makes a finding under *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), that a prosecutor's race-neutral explanation for a peremptory challenge is genuine, that fact may dispose of a claim under *Batson* v. *Kentucky*, 476 U. S. 79 (1986). Section 2254(d) would not apply to the federal *Batson* claim if it was not timely made in state court and, therefore, not decided on the merits. In such a case, the state court's finding of facts must be presumed correct under § 2254(e)(1) unless rebutted by clear and convincing evidence.

Subdivision (e) can also come into play when a petitioner succeeds in establishing one of subdivision (d)'s exceptions but does not simultaneously establish he is entitled to relief. *Woodford* v. *Visciotti*, 537 U. S. 19 (2002) (*per curiam*), provides an example. In that case, the Ninth Circuit concluded that the California Supreme Court had applied the wrong standard for judging an ineffective assistance of counsel claim. See *id.*, at 21-22. The Ninth Circuit was mistaken, and this Court reversed, *id.*, at 27, but we can hypothesize a case where the state court really did apply the wrong standard. In such a case, § 2254(d)'s bar would be lifted, but the petitioner would still have to establish that he is entitled to relief on the merits. Any facts found by the

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4. Adequacy of state grounds is presently before this Court in *Beard* v. *Kindler*, No. 08-992. Independence of state grounds is presently before the Court in *Sullivan* v. *Florida*, No. 08-7621.

state court must be rebutted by the petitioner with clear and convincing evidence.

In summary, § 2254(d)(2) and § 2254(e)(1) must be applied according to their terms, with neither precluding the other. When the state court findings of fact are found to be reasonable under § 2254(d)(2) *and* no other basis for avoiding the bar of § 2254(d) applies, then § 2254(e)(1) becomes inapplicable only in the sense that it is unnecessary. There should be no evidentiary hearing because the claim is precluded by the prior decision and there is nothing further to decide. See CJLF *Bell* Brief 24. In other cases, where § 2254(d) does not bar relief, the habeas court decides whether a hearing is needed and applies § 2254(e)(1) to any facts decided by the state court, regardless of whether those facts were found in the course of deciding the claim now before the federal court or in the course of deciding some other issue. Thus, each provision has independent operation, and neither is superfluous.

III. In cases with no federal evidentiary hearing, including this one, the (d)(2) and (e)(1) inquiries typically point to the same result.

Petitioner Wood and *amicus* ACLU correctly point out that there has been confusion in federal courts as to the relationship between § 2254(d)(2) and (e)(1). Brief for Petitioner 37; ACLU Brief 5. The confusion is easy to remedy, but not in the manner proposed by Petitioner and the ACLU.

The focus of petitioner's and *amicus's* ire regarding § 2254(e)(1) appears to be footnote 23 of the Court of Appeals' opinion. This footnote is worth quoting in the context of its accompanying text:

"For several reasons, Wood has not established that the state courts' decision was contrary to, or an unreasonable application of, established Supreme Court precedent or based on an unreasonable determination of the facts. First, the Rule 32 evidence amply supports the state courts' fact findings.[22] Very experienced counsel Dozier and Ralph had Dr. Kirkland's report revealing Wood's mental deficiencies but did not give it to the jury or have Trotter give it to the jury. Dozier was the primary contact with Dr. Kirkland and had a lot of correspondence with him, and even Trotter specifically testified that Dozier had reviewed Dr. Kirkland's report. While Dozier had no files left and could not recall the details of Dr. Kirkland's report six years later, he was sure they would have used anything useful in the report. Moreover, at the start of the penalty phase, Dozier and Ralph were present in court when Trotter expressly told the trial judge, on the record and on behalf of the trial team, that Dr. Kirkland had evaluated Wood and counsel did not intend to introduce Dr. Kirkland's report to the jury. Trotter testified that Dozier reviewed Dr. Kirkland's report and decided nothing merited going further. And Dozier and Ralph, as experienced counsel, were present in court during the entire penalty phase. The evidence amply supports the state courts' fact findings that experienced counsel (1) decided calling Dr. Kirkland would not be in Wood's best interest, and (2) decided against presenting mental health evidence. Wood has wholly failed to show the state courts made an unreasonable determination of the facts.[23]

"22. Whether counsel made a decision "regarding what evidence to put forth at sentencing is a ques-

tion of fact." *Jackson v. Herring*, 42 F. 3d 1350, 1366 (11th Cir. 1995); see also *Gaskin v. Sec'y, Dep't of Corr.*, 494 F. 3d 997, 1003 (11th Cir. 2007).

"23. At a minimum, Wood has not presented evidence, much less clear and convincing evidence, that counsel did not make such decisions about Dr. Kirkland's report and a mental health defense. See *Bolender v. Singletary*, 16 F. 3d 1547, 1558 & n.12 (11th Cir. 1994) (holding that "state court findings of historical facts made in the course of evaluating an ineffectiveness claim," such as the state court's finding that defense counsel was aware of defendant's general background, were entitled to presumption of correctness). Our colleague's separate opinion basically conducts de novo review and cherry picks certain statements to support its conclusions, rather than examining whether there is evidence to support the state courts' findings. The main difference between the opinions is that the majority applies the required AEDPA deference but the separate opinion does not." *Wood* v. *Allen*, 542 F. 3d 1281, 1303-1304 (CA11 2008).

The main text paragraph is clearly applying § 2254(d) and deciding that neither exception to that subsection's general bar on relitigation applies, employing the correct standard for subsection (d)(2), "unreasonable determination of the facts." The only implied reference to § 2254(e)(1) is the entirely superfluous phrase "much less clear and convincing evidence" in the footnote. In context, there is no doubt that the "clear and convincing" language is not essential or even important to the decision. This is not reversible error but merely less-than-perfect opinion drafting. "[T]his Court reviews judgments, not opinions." *Chevron U. S. A., Inc.* v. *Natural Resources Defense Council,*

Inc., 467 U. S. 837, 842 (1984).[5] The premise of Petitioner's second question presented is that the Court of Appeals majority "focus[ed] solely on whether there is clear and convincing evidence . . . ." Brief for Petitioner i. That premise is false.

As *amicus* ACLU acknowledges, the Court of Appeals in this case is in good company with its passing reference to "clear and convincing evidence" in a case governed by § 2254(d)(2). See ACLU Brief 11 (citing *Miller-El* v. *Dretke*, 545 U. S. 231, 266 (2005); *Wiggins* v. *Smith*, 539 U. S. 510, 528 (2003)). The reason, quite simply, is that these two verbal formulations are essentially equivalent in the context of a habeas case with no additional evidence. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 696 (1984) ("minor differences in the lower courts' precise formulations of the performance standard are insignificant").

When a state court's finding of fact is clearly and convincingly rebutted by evidence that was before that court, then the finding is unreasonable. Conversely, if the finding was reasonable, then the evidence petitioner placed before that court did not rebut it clearly and convincingly. See *Miller-El*, 545 U. S., at 266.

The Court of Appeals could have and probably should have stopped with the conclusion that the state court reasonably found the facts and reasonably applied them using the correct standard. Cf. *Rice* v. *Collins*, 546 U. S. 333, 339, 342 (2006). The incidental refer-

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5. *Amicus* ACLU also contends that on page 1305 the Court of Appeals "confus[ed] things still further" by referring to a presumption that trial counsel's decision was reasonable. ACLU Brief 16. That presumption is taken directly from the landmark precedent on the rule of law at issue in this case. See *Strickland* v. *Washington*, 466 U. S. 668, 689 (1984). It has nothing to do with AEDPA, and the Court of Appeals correctly identified the source. See 542 F. 3d, at 1305.

ence to clear and convincing evidence had no effect on the decision and is certainly not a basis for reversal.

IV. This case illustrates how the *Lockett* rule, in conjunction with *Strickland* as distorted by *Rompilla*, provides unlimited ammunition to attack every capital trial defense.

As the first major point of his brief on the merits, Petitioner makes a 28 U. S. C. § 2254(d)(1) attack on the state court decision, contending that it was an unreasonable application of *Strickland* v. *Washington*, 466 U. S. 668 (1984). See Brief for Petitioner 24-34. Respondents correctly note that this argument is not fairly included in the questions presented and is without merit. See Brief for Respondents 47.

Amicus CJLF will only add a brief note to point out that the fact that this claim can be made at all under the circumstances of this case illustrates how far the law has drifted from the deferential standard of *Strickland*. In that case, this Court warned,

> "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. *Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense.* Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Strickland*, 466 U. S., at 690 (emphasis added).

That is exactly what has happened in capital cases. Ineffective assistance in the penalty phase is alleged in virtually every case. The "anything goes in mitigation" rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), creates an easy target. With the defendant's entire life deemed relevant, postconviction counsel can *always* find something that trial counsel supposedly should have investigated or supposedly should have presented. The result is to ratchet up the cost and extend the delay in capital cases to the point that legislatures must seriously consider abandoning justice in the very worst murder cases because it is unaffordable, unachievable, or both. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Certiorari Petition in *Schriro* v. *Styers*, No. 08-1350, pp. 13-18.

The problem was significantly aggravated by this Court's decision in *Rompilla* v. *Beard*, 545 U. S. 374 (2005). That decision was a "distortion of *Strickland*." *Id.*, at 397 (Kennedy, J., dissenting). It gave too much weight to the ABA Standards for Criminal Justice, *id.*, at 400, and failed to give defense counsel the proper leeway in the allocation of their limited resources. See *id.*, at 401. If this Court does decide to address the merits of this issue, it would do well to prune back the "duty to investigate" implications of *Rompilla*, if not overrule that case altogether.

The evidence in the state collateral review in this case demonstrates that trial counsel's decision not to investigate further down the mental defense road was not only reasonable, it was correct. Counsel reasonably decided that the diagnosis of borderline intellectual functioning (*not* retardation) would not be helpful to their client and indeed went so far as to move to exclude psychological evidence. See Brief for Respondents 2. The additional evidence that Petitioner now contends counsel should have discovered is not, on the

whole, mitigating. His placement in special education, Brief for Petitioner 15-17, adds little that is not apparent from the diagnosis. The contradictory testimony of two of Wood's sisters, *Wood* v. *Allen*, 542 F. 3d 1281, 1299 (CA11 2008), adds little to the picture that one of them presented at trial. See *id.*, at 1296-1297.

Most importantly, the mitigating value of Wood's mental status was severely undermined, if not completely destroyed, by the testimony of his former girlfriend and his former boss. These two people, who knew Wood very well, did not consider him impaired at all. See *id.*, at 1288. Whatever his deficiencies on artificial psychological tests or in the academic realm, when it came to the real world Wood was capable of functioning at a level that people around him regarded as normal. He was capable of normal functioning, that is, when he chose to behave normally. When he chose aberrant behavior, such as attempting to murder former girlfriends on three separate occasions, he was capable of that, too.

Counsel in this case made a reasonable decision not to further investigate mental mitigation when their initial expert evaluation indicated little of mitigating value. In this case, the decision can be seen to be correct even in hindsight, although that is not required. See *Strickland*, 466 U. S., at 689. The Sixth Amendment guarantees reasonably effective counsel. It does not guarantee unlimited resources. The state should not be required to write a blank check for capital defense to conduct a "no stone unturned" investigation. Reasonably effective assistance means making decisions within the constraints of limited resources. If this Court does address the merits of Petitioner's § 2254(d)(1) argument, it should disavow any contrary implications of *Rompilla*.

V. A state court decision does not lose its entitlement to deference merely because the trial court adopts proposed findings prepared by the prevailing party.

Amicus National Association of Criminal Defense Lawyers has submitted a brief contending that state court findings of fact should be entitled to less deference under 28 U. S. C. § 2254(d)(2) when the trial court adopted proposed findings submitted by the prevailing party, the prosecution. Respondents apparently considers this argument to be so obviously meritless as to not require a response, but we will add just a few words.

Amicus NACDL, at pages 4 and 19 of its brief, quotes dicta from *Anderson* v. *Bessemer City*, 470 U. S. 564, 572 (1985), criticizing the practice, but omits the holding of the case that immediately follows these dicta: "Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous."

In a case governed by Federal Rule of Civil Procedure 52(a), the same standard of review on appeal, "clearly erroneous," applies regardless of whether the judge adopted a party's proposed findings. That is also how it should be in a case governed by 28 U. S. C. § 2254(d)(2). Given the history and purpose of AEDPA, it is inconceivable that Congress intended that state court findings of fact challenged in federal court would receive less deference than a federal trial court's findings challenged on direct appeal. The main point was to make federal habeas review more restricted than an appeal, not broader. See 141 Cong. Rec. 15062, col. 3 (1995) (statement of Sen. Hatch).

The question of whether the word "unreasonable" in § 2254(d)(2) can refer to an unreasonable procedure

as well as a determination that is unreasonable on the merits remains open, pending a case that actually presents it. A claim of that type was made before this Court last term, but the factual premise of the claim was false. See Tr. of Oral Arg. in *Bell* v. *Kelly*, No. 07-1223, pp. 4-5. The issue is also not presented in this case. The practice of adopting findings submitted by a party may warrant criticism, but *Anderson* conclusively negates the proposition that it is so inherently unfair as to warrant a departure from the usual standard of review.

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

September, 2009

Respectfully submitted,

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APPENDIX

§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS [Amended.]

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)*(1)* An application for a writ of habeas corpus *on* ~~in~~ behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State~~;~~*;* or ~~that~~

(B)(i) there is ~~either~~ an absence of available State corrective process*;* or ~~the existence of~~

(ii) circumstances *exist that* render~~ing~~ such process ineffective to protect the rights of the *applicant* ~~prisoner~~.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

~~(d)~~*(e)(1)* In *a* ~~any~~ proceeding instituted ~~in a Federal court~~ by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination ~~after a hearing on the merits~~ of a factual issue~~,~~ made by a State court ~~of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia,~~ shall be presumed to be correct. *The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.* ~~, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—~~

~~(1) that the merits of the factual dispute were not resolved in the State court hearing;~~

~~(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;~~

~~(3) that the material facts were not adequately developed at the State court hearing;~~

~~(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;~~

~~(5) that the applicant was an indigent and the State court, in deprivation of his constitutional~~

~~right, failed to appoint counsel to represent him in the State court proceeding;~~

~~(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or~~

~~(7) that the applicant was otherwise denied due process of law in the State court proceeding;~~

~~(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:~~

~~And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.~~

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

~~(e)~~*(f)* If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

~~(f)~~*(g)* A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act,[5] *in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.*

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub. L. 104-132, § 104.)

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5. 21 U.S.C. § 848.

AMICUS CURIAE BRIEF

No. 08-9156

IN THE

Supreme Court of the United States

HOLLY WOOD,

Petitioner,

v.

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF INDIANA AND 18 ADDITIONAL STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise?

2. Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?

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INTEREST OF AMICI CURIAE

The *amici* States have an obligation to protect the finality of the judgments entered by their courts—an obligation that is even more compelling when it involves criminal judgments. Undoing finality in habeas corpus litigation in the federal courts can undermine the States' interests in ensuring safety, deterring crime, and rehabilitating criminal offenders. The passage of time that accompanies even successful collateral attacks increases the risk of unfair or inaccurate retrials. Moreover, comity and federalism require the federal courts to refrain from overreaching in the exercise of their authority to review state court criminal judgments under 28 U.S.C. § 2254.

This case asks the Court to interpret two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that strengthened the longstanding deference owed to state court factual findings. The *amici* States encourage the Court to construe those provisions consistent with both their letter and intent, ensuring that state court factual determinations are properly respected during the intrusive, albeit limited, federal habeas corpus review process.

SUMMARY OF THE ARGUMENT

Respondent is correct in maintaining that 28 U.S.C. § 2254(e)(1) applies to all § 2254 habeas corpus cases and that § 2254(d)(2) and (e)(1) have independent meanings yet operate in a coordinated way to narrow the scope of a federal habeas court's review of state court factual findings. The *amici*

States, however, offer additional perspective on these questions.

First, *amici* States suggest that the Court explain that the proper standard for judging whether a state court's factual adjudication is "unreasonable" under § 2254(d)(2) is for federal courts to ask whether the state court record contains rational support for the findings—in other words, federal courts should examine the record for sufficient evidence under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). These standards are logically identical, and the Court should explicitly so hold.

Second, the *amici* States discuss additional, common scenarios that arise in habeas corpus litigation and examine how those situations will be affected by Petitioner's and Respondent's proposals. Most significantly, Petitioner's suggestion that § 2254(e)(1) can apply only to federal evidentiary hearings fails to account for the increasing number of prisoners who have supplemented the factual basis for their constitutional claims during state post-conviction review even though the merits of their claims were adjudicated at the trial or on direct appeal. Without § 2254(e)(1) operating in all cases, there is no provision for federal review of such facts. It strains credulity to insist that Congress intended to either allow prisoners to avoid any sort of deferential review of their evidence, or, on the other hand, preclude them from receiving federal review of their "new" evidence at all. Properly understood, § 2254(d)(2) and (e)(1) operate together to balance these competing interests.

Simply put, AEDPA's structure for reviewing factual findings, as provided by § 2254(d)(2) and (e)(1), provide a comprehensive method for evaluating state court factfinding while ensuring that federal courts respect and defer to those judgments in appropriate circumstances. The Court should affirm the judgment of the court of appeals.

ARGUMENT

The *amici* States agree with Respondent that 28 U.S.C. § 2254(e)(1) applies to all §2254 habeas corpus cases and that § 2254(d)(2) and (e)(1) have independent meanings yet operate in a coordinated way to narrow the scope of a federal habeas court's review of state court factual findings. These provisions are both critical to AEDPA operating in the manner intended by Congress. Petitioner and his *amici*, however, suggest arguments that run contrary to both AEDPA's text and well-recognized Congressional intent. Moreover, Petitioner's arguments harm the ability of many of his fellow state prisoners who seek federal review of their confinement. The Court should use this opportunity to provide additional guidance to the federal courts on the proper operation of § 2254(d)(2) and (e)(1).

I. Federal courts are prohibited under 28 U.S.C. § 2254(d)(2) and (e)(1) from rejecting state court factual determinations where the state court record supports the state court findings

The Court should interpret the "unreasonable determination" clause of § 2254(d)(2) as requiring habeas petitioners to show that no rational support

for a state court's factual determinations is found within the state court record. Section 2254(d)(2) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> * * *
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The "unreasonable determination" standard of § 2254(d)(2) has escaped the Court's specific definition even though it has had occasion to consider it in several cases. *See generally Wiggins v. Smith*, 539 U.S. 510 (2003); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Rice v. Collins*, 546 U.S. 333 (2006). The Court's precedents in reviewing state court factfinding in similar contexts and in earlier iterations of habeas review provide guidance on what Congress meant when enacting the "unreasonable determination" standard. While courts know that this requires a showing that the state court's factual findings were objectively unreasonable, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), the Court has not provided additional guidance as to this meaning like it has done in the context of § 2254(d)(1). *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (opinion of O'Connor, J.).

Section 2254(d)(2) commands federal courts to review qualifying factual determinations for rational support in the evidence presented to the state court. This inquiry, which has its roots in the *Jackson v. Virginia*, 443 U.S. 307 (1979), test for reviewing guilty verdicts for sufficiency of the evidence, is an appropriately deferential inquiry into factfinding reasonableness and has a well-defined meaning that is widely understood and regularly applied.

1. The "unreasonable determination" standard in § 2254(d)(2) shares the same level of review as the objectively "unreasonable application" standard in § 2254(d)(1) that establishes the preclusive effect of state court adjudications of legal questions. The "unreasonable application" standard is more deferential than the "clear error" standard that governs review of a district court's factfinding. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *accord Williams*, 529 U.S. at 409-11 (an unreasonable application of federal law is an objectively unreasonable one and is altogether different from an incorrect application of the law). Repeated uses of "unreasonable" in the same section of AEDPA should bear the same meaning. *Estate of Cowart v. Niklos Drilling Co.*, 505 U.S. 469, 478 (1992).

Viewed another way, it is unreasonable to believe that Congress required more scrutiny of state court factfinding than it required of state court rulings applying federal constitutional law. Broad questions of constitutional law implicate a far greater federal interest than case-specific findings of historical facts, and yet even prior to AEDPA, the Court accorded state courts considerable deference in finding the facts where it accorded little or none to the same

state court's determinations of federal law. *Compare Miller v. Fenton*, 474 U.S. 104, 112 (1985) (declining to presume correct state court findings on questions of law and mixed questions of law and fact), *with Sumner v. Mata*, 449 U.S. 539, 549-50 (1981) (discussing history and intent of former § 2254(d)).

2. This Court's pre-AEDPA precedents and Congress's well-recognized purpose to further restrict the availability of habeas relief under AEDPA also support using the *Jackson* rational-support test to review state court factfinding for objective unreasonableness. Prior to AEDPA, even while federal habeas courts demonstrated the historically lowest amount of deference to state court determinations of law and mixed questions of law and fact, *Wright v. West*, 505 U.S. 277, 286-91 (1992) (plurality), federal courts recognized their obligation to demonstrate a high measure of deference for state court determinations of historical facts. *Sumner*, 449 U.S. at 546-47.

In *Marshall v. Lonberger*, 459 U.S. 422 (1982), the Court reversed a court of appeals' decision to credit the prisoner's testimony and set aside the state court factual findings as not "fairly supported by the record" pursuant to the former 28 U.S.C. § 2254(d)(8) (1995). 459 U.S. at 431. In so doing, the Court explained that the factual determinations, along with "the inferences fairly deductible" from them were binding and fairly established that the prisoner's guilty plea was intelligent and voluntary. *Id.* at 437-38. Federal courts had "no license to redetermine the credibility of witnesses" whose testimony was observed by the state courts, and must defer to state court where the federal court

merely disagreed with the state court's factual determinations. *Id.* at 434.

In *Maggio v. Fulford*, 462 U.S. 111 (1983) (*per curiam*), the Court condemned a federal court of appeals that, in light of uncontradicted expert testimony from the defendant's psychologist, rejected as not "fairly supported by the record" the state court finding that there was insufficient doubt as to a defendant's competency to stand trial so as to necessitate a formal inquiry. 462 U.S. at 113-17. The Court made clear that federal courts were prohibited from substituting their own judgment for that of the state courts. *Id.* at 113. Similarly, in *Rushen v. Spain*, 464 U.S. 114 (1983) (*per curiam*), the Court emphasized that a "state court's determinations about witness credibility and inferences to be drawn from the testimony were binding" on federal courts. 464 U.S. at 121 n.6.

Moreover, the Court has recognized that review of state court factfinding in habeas corpus must necessarily be no more far-reaching than review of federal court factfinding. "We greatly doubt that Congress, when it used the language 'fairly supported by the record' considered 'as a whole,' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." *Lonberger*, 459 U.S. at 434-35. *See also Wainwright v. Witt*, 469 U.S. 412, 427, 428 n.9 (1985) ("given federal factfinding is accorded deferential review on direct appeal, "the respect paid to such findings in habeas proceedings certainly should be no less."); *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality) ("It would 'pervert the concept of

federalism'. . . to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings").

Federal court factfinding is reviewed for "clear error," a basic precept of which is that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). Even in the context of direct review of state court judgments, the Court defers to state court factual findings absent clear error, even when the issue is dispositive of a constitutional dispute. *Hernandez*, 500 U.S. at 366-69. At a minimum, the Court recognized Congressional intent that state court factual findings be reviewed for no less than clear error when determining whether a petitioner could avoid the presumption of correctness found in the former § 2254(d) by showing that there was not "fair support" in the record for the state court's determinations.

However, the Court prior to AEDPA recognized that some circumstances necessitated greater deference than that provided by "clear error" review and proscribed a review for rationality and reasonableness. Chief among those instances was *Jackson*, which held that a state court's findings of the factual elements of an offense were binding under § 2254 if the trial court permitted "any rational factfinder" to conclude that the elements were proved beyond a reasonable doubt. 443 U.S. at 319. Under this rationality review, a prisoner's challenge to the state court factfinding cannot prevail is merely based upon inferences from the

evidence that are different from other rational permissible inferences that could be drawn. *Id.*

The Court extended the *Jackson* standard to federal court review of state court factfinding not involving the elements of crimes to which a lesser standard of proof applies. *Lewis v. Jeffers*, 497 U.S. 764, 780-82 (1990) ([I]n determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard is the "rational factfinder" standard"). *See also Parke v. Raley*, 506 U.S. 20, 36 (1992) (suggesting, but not deciding, that the *Jackson* standard may be appropriate to review the voluntariness of a prior guilty plea in the context of Kentucky's persistent felony offender sentencing scheme).

Against this backdrop, Congress enacted AEDPA and placed "more, rather than fewer, limits on the power of federal courts" to grant habeas corpus relief. *Miller-El*, 537 U.S. at 337. *See also Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001). By abandoning the prior *de novo* review of legal questions and deferential review of factual determinations for a singular "unreasonableness" review, Congress indicated its intent to provide for a habeas review of both legal and factual questions with objectiveness and rationality as its lodestars. The *Jackson* standard provides that review for state court factual decisions.

3. The current § 2254(d)(2) standard of heightened deference—review that is both less intrusive than the "clear error" standard and dependent upon the objective question of whether the evidence before the state court would have compelled all reasonable factfinders to agree with the habeas petitioner—equates with the rational support standard of *Jackson*. The *Jackson* inquiry is one of reasonableness, 443 U.S. at 325, and asks whether "no rational trier of fact could have found" the pertinent fact, under the applicable standard of proof, in light of the record before the factfinder. *Id.* at 324.

This review queries whether any "substantial evidence" supports the trier of fact's determination. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Jackson*, 443 U.S. at 318-19 & n.12; *Powell v. United States*, 469 U.S. 57, 67 (1984). The reviewing court examines the record in the light most favorable to the factual determination and presumes in support of it the existence of every fact that reasonably may be deduced from the evidence. *Jackson*, 443 U.S. at 325; *Glasser*, 315 U.S. at 79. It does not "weigh the evidence" or "determine the credibility of witnesses." *Glasser*, 315 U.S. at 79. *See also Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review."). These standards provide useful guidance for judges well-versed in the requirements of *Jackson*. *Cf. Williams*, 529 U.S. at 409 (criticizing the formulation of the "unreasonable application" standard by reference to "reasonable jurists" as being unhelpful to courts).

II. Sections 2254(d)(2) and (e)(1), together and separately, restrict federal court second-guessing of state court factual findings and preclude habeas relief where state courts have reached reasonable factual decisions

Regardless of how one defines the "unreasonable determination" clause, § 2254(d)(2) and (e)(1) work together and separately to ensure that federal courts accord state court factual findings substantial respect and deference by limiting not only a federal court's ability to second-guess the state court factfinders, but also restrict the availability of habeas relief for factual disputes. AEDPA's reforms strengthened the preclusive effect of factual determinations made in the state courts, where our system of appellate and collateral review of criminal judgments has traditionally channeled primary responsibility.

In this regard, the majority of circuits properly understand the cooperative, yet distinct, roles that § 2254(d)(2) and (e)(1) play in delimiting the scope of federal habeas review of state court factual findings. Through these statutes, Congress has deliberately required federal courts to afford a broad presumption of correctness to all state court factual findings (subject to an appreciably high burden of proving them incorrect) while at the same time restricting the circumstances under which a court may grant habeas relief based on allegedly incorrect factual determinations.

The distinction may initially appear subtle. Each subsection, however, plays a distinct, indispensable

role in implementing Congress's intent to strengthen the preclusive effect of state court factual findings. In sum, sections (d)(2) and (e)(1) bind federal courts to state court factual determinations unless those findings are both clearly and convincingly wrong in light of the totality of the evidence and lack any rational support in light of only that evidence presented to the state court.

A. Section 2254(d)(2) requires deference to factual findings supporting a state court merits determination.

The structure and text of § 2254(d)(2) is noteworthy for several reasons. First, § 2254(d)(2) governs the federal courts' authority to grant habeas corpus relief. Second, it applies only to claims that a state court adjudicated on the merits. Third, relief is available only if a state court's factual determination is "unreasonable." Fourth, the federal courts are permitted to judge the reasonableness of a state court's factual findings only with regard to the "evidence presented in the State court proceedings."

These qualifications thus define the scope of a federal court's "unreasonableness" review, but they speak nothing of the appropriate level of deference federal courts must pay to other state court factual findings that fall outside § 2254(d)(2)'s scope. Such findings might relate to background facts or collateral issues whose full importance to the resolution of a prisoner's claims becomes apparent only in federal court. They might involve evidence developed after the state court made its finding but before federal habeas review, such as during state post-conviction review. Or, as Petitioner and his

amici point out, they might involve the unusual occasion were new evidence is developed during a federal evidentiary hearing that clearly and convincingly proves a state court factual finding to have been wrong. It is these various forms of factual findings that lie outside of the purview of § 2254(d)(2) where § 2254(e)(1) is particularly important.

B. Section 2254(e)(1) affords a presumption of correctness for other state court factual determinations.

Section 2254(e)(1) speaks in broad terms and applies universally to all habeas corpus petitions.

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

That AEDPA made the presumption of correctness unconditional marks a significant change in habeas jurisprudence. The prior presumption of correctness statute, the former § 2254(d), conditioned the presumption on three prerequisites (an evidentiary hearing in state court on the merits of the factual issue, made by a court of competent jurisdiction, resulting in written findings of fact) that the State had the burden of establishing. Once established, the presumption could be rebutted by

"convincing" evidence of erroneousness or avoided altogether if one of eight conditions existed. 28 U.S.C. § 2254(d)(8) (1995) (presumption conditioned on "adequate" state procedures, "full and fair hearing" in state court, presence of counsel in the state hearing, federal court satisfaction that the factual determination was "fairly supported" by the state court record, etc.).[1]

AEDPA also amended a prisoner's burden to overcome the presumption by, if anything, strengthening the burden by requiring "clear and convincing" evidence, rather than only "convincing" evidence, that the state court erroneously found the facts. That is an extremely heavy burden, and such evidence leaves the question in no doubt. *Schneiderman v. United States*, 320 U.S. 118, 135 (1943). Indeed, this presumption is "typically *relief barring*." Randy Hertz & James S. Leibman, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §20.2c at 919 (5th Ed. 2005) (emphasis in original).

C. Sections 2254(d)(2) and (e)(1) separately address common habeas scenarios.

1. When their express terms are contrasted, three key differences between § 2254(d)(2) and (e)(1) emerge. First, application of § 2254(d)(2) is predicated on the state court having *actually adjudicated the merits* of the prisoner's legal claim. Section 2254(e)(1), on the other hand, has no such requirement. Indeed, AEDPA completely unmoored the presumption of correctness from any state court

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[1] Respondent has reproduced the entire text of the former version of § 2254(d) at pages 2a-3a of the merits brief.

merits adjudications. *Compare* 28 U.S.C. § 2254(d) (1995) (requiring state courts to have fully adjudicated a factual issue following a full and fair hearing before a presumption of correctness attached), *with* 28 U.S.C. § 2254(e)(1) (only requirement is that a state court have "determin[ed] a factual issue").

2. Section 2254(d)(2) review is constrained to only those factual findings that *actually formed the basis* for the state court's decision, while the presumption of correctness in § 2254(e)(1) applies to *all* discrete factual findings, regardless whether essential to the state court judgment. *Miller-El*, 537 U.S. at 341. Section 2254(e)(1) permits federal courts to reevaluate any factual finding, so long as the prisoner produces clear and convincing evidence that the state court was wrong. This distinction is important in cases where a prisoner asks the habeas court to reconsider the evidence relating to factual issues upon which the state court did not base its decision (perhaps it was a collateral issue, or even irrelevant in the state court's view) but which the prisoner—and perhaps a federal habeas court—may find to be of more importance to the merits of the claim. While these instances may be rare, Petitioner's reading of § 2254(e)(1) would foreclose those prisoners from receiving any review whatever of their additional evidence.

3. Perhaps most significantly, § 2254(d)(2) limits a federal court to considering *only the evidence actually presented in the state court proceeding where the adjudication was made* when judging the reasonableness of a factual determination. There is no such temporal limitation on evidence in

§ 2254(e)(1). Under the *amici* States' reading of § 2254(e)(1), prisoners can rebut the presumption of correctness with evidence developed in state court proceedings that came *after* the initial adjudication of their claim—even if that evidence was unknown to the state court at the time of the factual finding. Petitioner's reading of § 2254(e), however, would not permit federal review of those facts. While prisoners must still satisfy § 2254(d) in order to receive relief, restricting the ability of prisoners to rebut the presumption of correctness to only the handful of cases that qualify for an evidentiary hearing will effectively prevent some habeas petitioners from receiving federal court review of all of the evidence tending to show a state court made an erroneous factual finding.

In light of the expansion of vigorous state post-conviction review and the common practice of litigating ineffective assistance of counsel claims during that stage of review, States have seen their prisoners increasingly use state post-conviction review to develop additional facts that relate to a host of claims that were adjudicated before, at, or immediately after trial. For example, a prisoner raises a claim of ineffective assistance of counsel during state post-conviction review and presents evidence showing that his trial counsel failed to present certain medical evidence to the trial court that could have affected the trial judge's finding that he was competent to stand trial.[2] Although the prisoner also asked the state post-conviction courts to revisit the freestanding question of competency,

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[2] Practically any claim that is contingent on factual findings made before, during, or immediately after trial could be substitute for the competency claim used in this example.

the state courts refuse to reconsider the freestanding issue but reject the ineffective assistance of counsel claim.

On federal habeas review, the only mechanism by which that prisoner could ask a federal court to consider his "new" evidence would be through § 2254(e). While federal courts may, consistent with § 2254(e)(1) and (2), consider through expansion of the record or evidentiary hearings new evidence that was unavailable to the state courts, evidentiary hearings are unavailable in practically all habeas petitions. In our example, the prisoner could not receive a federal evidentiary hearing because his "new" evidence was already fully developed in state court, was discoverable through the exercise of due diligence at the time of trial, and cannot prove "by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the [prisoner] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). *Cf. Williams v. Taylor*, 529 U.S. 420, 441-45 (2000).

The prisoner is therefore left with an impossible burden: prove that the state court's competency finding is objectively unreasonable given the evidence actually presented during the competency hearing. Petitioner's overly narrow view of the presumption of correctness would conclusively preclude federal-court consideration of any evidence that fails to satisfy the criteria for an evidentiary hearing but nevertheless is contained within the state court record before the federal court.

4. None of this is to say, however, that § 2254(e)(1) provides independent authority to grant

habeas relief. AEDPA still requires habeas petitioners to show that the state courts legal conclusions or factual determinations are unreasonable under § 2254(d). This is because the touchstone of a § 2254(e)(1) analysis is not the reasonableness of a state court's factual finding, but its correctness, and AEDPA limits habeas relief to cases where the state court acted objectively unreasonably. While not presented in this case, AEDPA might permit a federal court, in cases where the prisoner has satisfied his burden of presenting clear and convincing evidence at a federal evidentiary hearing, to review a state court finding for reasonableness under § 2254(d)(2) in light of the newly developed and highly persuasive evidence.[3]

Indeed, as Respondent observes, *Respondent's Br.* at 37 n.12, there are instances—perhaps rare—where a state court factual determination is reasonable even if proven erroneous through clear and convincing evidence. *Lockyer*, 538 U.S. at 75 ("unreasonableness" review is more deferential than "clear error" review). That question is academic here, where Wood's claim rests entirely on evidence developed in state court at the time of the factfinding.

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[3] While such a reading strains the text of both subsections, it does less violence than Petitioner's view that § 2254(e) provides an avenue for relief independent of § 2254(d). This narrow issue, however, is best addressed only after thorough consideration in a case that squarely presents it; this case is not that vehicle.

* * *

Respondent's understanding—and that of a majority of circuits—of the interplay between § 2254(d)(2) and (e)(1) when reviewing factual findings based solely on the evidence presented to the state court is consistent with Congress's intent in enacting AEDPA: to require deference to reasonable state court judgments in finally adjudicating habeas claims, while restricting federal courts from inappropriately substituting their judgment for that of the state courts during the adjudication process.

As explained fully by Respondent, these subsections work together in similar ways in cases where, as in a vast majority of federal habeas petitions, a prisoner does not present new evidence of a "clear and convincing" nature and instead merely asks the federal court to second-guess the state court's resolution of the factual issues. Because that prisoner cannot present evidence different from that which he presented to the state courts, he cannot overcome the AEDPA-enhanced presumption of correctness found in § 2254(e)(1) unless the state court record contains clear and convincing evidence that leads unquestionably to a finding contrary to the state courts. Even then, the plain language of AEDPA requires federal courts to defer to the state court judgment so long as the state court record provides a minimum level of reasonable support for the state court's findings. In such circumstances, it is appropriate for federal courts to view the standards of § 2254(d)(2) and (e)(1) as requiring a prisoner to prove his factual assertions by clear and convincing evidence while at the same

time showing that the state court decision was objectively unreasonable in finding the facts to the contrary. This case is such an example.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HOLLY WOOD,

Petitioner,

v.

RICHARD F. ALLEN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1] Founded in 1958, NACDL has a membership of more than 12,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has an interest in ensuring the integrity of the administration of justice in criminal cases, including in post-conviction proceedings in capital cases, and believes that this case presents important issues relating to how federal courts should review state court decisions for reasonableness under the Antiterrorism and Effective Death Penalty Act.

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Summary Of Argument

This Court and other state and federal appellate courts have repeatedly noted that the practice by a trial court of adopting party-drafted orders wholesale often leads to significant errors and, at best, creates the appearance of unfairness. Yet this practice is common in postconviction proceedings in Alabama capital cases such as this one. Alabama prosecutors typically submit lengthy proposed orders even before the postconviction court has issued an oral decision and before the defendant has submitted a brief. Trial courts adopt these prosecutor-drafted orders verbatim even when they contain flagrant errors and inconsistencies, sometimes within days of their submission by the State. Often the court makes only one, superficial change: the addition of a boilerplate phrase—asserting that the court independently considered the State's assertions—which itself is incorporated verbatim from the State's cover letter at the State's request.

The Alabama post-conviction court ("Rule 32 court") issued two orders in this case that reflect this deplorable practice. The first order adopted the State's submission verbatim, less than two weeks after the State submitted its order and Petitioner Wood submitted a 157-page brief, which the order does not address at all. The court adopted the State's proposed order notwithstanding significant errors of fact relating to trial counsel's failure to investigate a potential mental capacity defense at sentencing. To insulate itself from the claim that it did not conduct an independent review, the court added a boilerplate phrase—that "the Court adopted the proposed order

only after considering all of the evidence [and] the arguments of both parties"—proposed by the State in its cover letter. The second order, following a remand by the state appellate court, adopted the State's proposed factual findings and legal conclusions nearly verbatim, repeating key misstatements from the proposed order asserting that trial counsel investigated a mental health mitigation defense. This prosecutor-drafted order was then adopted in full by the Alabama Court of Criminal Appeals, "[w]ithout any specific discussion or analysis of the findings in the trial court's order." J.A. 610 (Cobb., J., concurring in the judgment).

In light of the erroneous factual assertions in the State's proposed orders and their verbatim adoption by the Rule 32 court, the Eleventh Circuit erred in concluding under 28 U.S.C. § 2254(d) that the state court's determination of the facts was reasonable. The review for reasonableness under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, requires consideration not only of the substance of the state court orders, but also of the procedures by which they were adopted. In this case, the state court orders deserved greater scrutiny than they received in the Eleventh Circuit because they were written by a zealous advocate, not a neutral adjudicator.

Argument

This Court has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by statements to the record." *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985). Federal and state appellate courts have likewise "repeatedly condemned the ghostwriting of judicial orders." *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987).[2] Courts recognize that when judges adopt verbatim proposed findings by litigants, the "quality of

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[2] *See also, e.g., Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 n. 2 (2d Cir. 1987) (ghostwritten opinions are "frowned upon"); *Cuthberton v. Biggers Bros., Inc.*, 702 F.2d 454, 458 (4th Cir. 1983) (repeating a previous "admonition" against the practice of adopting proposed orders verbatim); *Ramey Const. Co. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464, 469 (10th Cir. 1980) ("almost never desirable"); *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980) ("discouraged"); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 & n.4 (1st Cir. 1970) ("courts have not looked with favor upon the practice"); *Bradley v. Md. Cas. Co.*, 382 F.2d 415, 424 (8th Cir. 1967) ("severely criticized"); *Roberts v. Ross*, 344 F.2d 747, 752 (3rd Cir. 1965) ("flies in the face of the spirit and purpose [of the federal rules]"); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 737 (5th Cir. 1962) ("unfortunate"); *In re Marriage of Nikolaisen*, 847 P.2d 287, 289 (Mont. 1993) ("discourage[d]"); *South Side Lumber Co. v. Stone Const. Co.*, 152 S.E. 2d 721, 724 (W.Va. 1967) (trial court "should not surrender or delegate [its] important function by a mechanical adoption of findings proposed by counsel"); *Pollock v. Ramirez*, 870 P.2d 149, 154 (N.M. Ct. App. 1994) (should be "avoid[ed]").

the judicial decisionmaking suffers." *Id.*[3] And the adoption of prosecutor-drafted orders leads not only to errors, but also to the "utter lack of an appearance of impartiality." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997).[4]

Nevertheless, the practice is virtually the norm in Alabama capital postconviction cases and is conducted in a manner that is especially likely to generate errors. Moreover, because the practice affected the state postconviction orders in Wood's case, the

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[3] *See also, e.g., United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942) (practice leads to "findings made by the district court [that] are not supported by the evidence and not substantially in accord with the opinion"); *Harrigan v. Glichrist*, 99 N.W. 909, 993 (Wis. 1904) ("quite liable to lead to bad results"); *E.L.S. v. F.M.S.*, 829 S.W.2d 19, 21 (Mo. Ct. App. 1992) ("Even the most conscientious advocate cannot reasonably be expected to prepare a document which would reflect precisely the trial court's view of the evidence.") (quotations and citations omitted); *Kaechele v. Kaechele*, 594 N.E.2d 641, 647 (Ohio Ct. App. 1991) ("breeds error and reversal").

[4] *See also, e.g., Schmidkunz v. Schmidkunz*, 529 N.W.2d 857, 858 (N.D. 1995) ("fail[s] to foster the appearance of fairness and impartiality"); *Safety Natural Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 993 n. 6 (Ind. App. 2005) ("weaken[s] our confidence . . . that the findings are the result of considered judgment by the trial court"); *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. Ct. App. 2005) ("raises the question of whether the court independently evaluated the evidence"); *Makino, U.S.A., Inc. v. Metlife Capital Credit Corp.*, 518 N.E.2d 519, 526 (Mass. App. Ct. 1988) (raises "a gnawing doubt . . . about how much the judge injected his own intelligence into the process"); *Krupp v. Krupp*, 236 A.2d 653, 655 (Vt. 1967) (may cause court to be "charged with overlooking the proper performance of its judicial function").

Eleventh Circuit should have taken it into account in evaluating under AEDPA the reasonableness of the state court's findings.

I. The Verbatim Adoption of Proposed Orders is Typical in Alabama Capital Postconviction Cases and Produces Serious Flaws in the Resulting Orders.

Like other courts, the Alabama Court of Criminal Appeals has cautioned that "courts should be reluctant to adopt verbatim the findings of fact and conclusions of law prepared by the prevailing party." *Weeks v. State*, 568 So. 2d 864, 865 (Ala. Crim. App. 1989). Indeed, the court has warned that "[i]n a capital case," "wholesale adoption of a draft prepared by the state gives rise to a legal issue of whether the findings and conclusions are in fact those of the court." *Williams v. State*, 627 So. 2d 985, 993 (Ala. Crim. App. 1991).

Despite these warnings, the verbatim adoption of proposed orders is common practice in postconviction proceedings in Alabama capital cases.[5] Moreover, the

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[5] *See Slaton v. State*, 902 So. 2d 102, 107 (Ala. Crim. App. 2003) (trial court "adopt[ed] the State's proposed order as its own"); *McGahee v. State*, 885 So. 2d 191, 229 (Ala. Crim. App. 2003) (trial court adopted the State's proposed order "without making significant modifications"); *Hamm v. State*, 913 So. 2d 460, 475 (Ala. Crim. App. 2002) ("the [trial] judge adopted the order drafted by the State"); *Dobyne v. State*, 805 So. 2d 733, 741 (Ala. Crim. App. 2000) (the findings of fact and conclusions of law of the trial court were "initially drafted by the State"), *aff'd*, 805 So. 2d 763 (Ala. 2001); *Lawhorn v. State*, 756 So. 2d 971, 977 (Ala. Crim. App. 1999) (trial court "adopt[ed] verbatim the state's findings of fact and conclusions in its order"); *Jones*

process by which proposed orders are adopted raises even greater concerns that they do not reflect independent judgment or analysis by the courts.

A. Comparison of proposed and actual orders in Alabama capital postconviction proceedings suggests that trial courts do not meaningfully review the State's proposed orders before adopting them verbatim. When proposed orders have been adopted by a trial court, the Alabama Court of Criminal Appeals has looked for "enough differences to convince [it] that the opinion and order represent[ed] the true findings of the [trial] court." *Grayson v. State*, 675 So. 2d 516, 519 (Ala. Crim. App. 1995). The court has distinguished such cases from those "where the judge merely 'uncritically accepted' and acquiesced in the findings of the prevailing party." *Thompson v. State*, 615 So. 2d 129, 132 (Ala. Crim. App. 1992) (quotations omitted).

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v. State, 753 So. 2d 1174, 1180 (Ala. Crim. App. 1999) (the "findings and conclusions of the trial court . . . were initially drafted by the State"); *Grayson v. State*, 675 So. 2d 516, 519 (Ala. Crim. App. 1995) (trial court "adopt[ed] the State's brief almost verbatim as the court's opinion and order"); *Hallford v. State*, 629 So. 2d 6, 8 (Ala. Crim. App. 1992) (trial court "adopted the state's opinion and order"); *Bell v. State*, 593 So. 2d 123, 126 (Ala. Crim. App. 1991) (trial court "adopt[ed] verbatim the proposed order tendered by the state"); *Hubbard v. State*, 584 So. 2d 895, 900 (Ala. Crim. App. 1991) (trial court's order was "substantially similar" to the State's proposed order); *Morrison v. State*, 551 So. 2d 435, 436 (Ala. Crim. App. 1989) (trial court's order was a "wholesale adoption of the State's proposed findings of fact and conclusions of law").

But the norm in Alabama capital postconviction cases is for the trial court to adopt the proposed order verbatim or nearly verbatim. According to an analysis conducted by Alabama's Equal Justice Initiative in 2003, in seventeen of the most twenty recent capital postconviction cases (as of 2003), "the trial judge adopted verbatim or almost verbatim an order denying or dismissing the Rule 32 petition which was written by the State." Decl. of Aaryn M. Urell ¶ 4, *Barbour v. Campbell*, No. 01-S-1530-N (M.D. Ala. Aug. 28, 2003). Since then, the practice has continued unabated. *See, e.g.*, *Broadnax v. State*, No. CC-96-5162.60 (June 14, 2005); *Barksdale v. State*, No. CC-96-03 (Oct. 6, 2005); *Ferguson v. State*, No. CC-97-343.61 (Oct. 18, 2006); *Dunaway v. State*, Nos. CC-97-75.60, 76.60 (Dec. 14, 2006); *Jackson v. State*, No. CC-1997-2300.60 (Jan. 26, 2007); *Scott v. State*, Nos. CC-00-840.60, 841.60, 842.60 (July 30, 2007); *Borden v. State*, No. CC-93-228.60 (Jan. 20 2009); *Miller v. State*, No. CC-99-792.60 (May 5, 2009).[6]

These proposed orders are typically submitted by the State *before* the court has issued even a preliminary ruling and before the defendant has submitted a brief. In some cases, the State's proposed order is adopted verbatim before the defendant has filed any brief at all. *See, e.g.*, *Borden v. State*, No. CC-93-228.60; *Broadnax v. State*, No. CC-96-5162.60; *Ferguson v. State*, No. CC-97-343.61.

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[6] All proposed and final orders and related documents from other Alabama cases cited in this brief are on file with counsel for amicus.

These proposed orders typically exceed 50 pages and sometimes approach or exceed 100 pages. *See, e.g., Hamm v. State*, No. CC-87-121.60 (89 pages); *Guthrie v. State*, No. CC-88-112.60 (97 pages); *Grayson v. State*, No. CC-94-3700.60 (156 pages). Yet they are often adopted verbatim less than two weeks after submission and have been adopted in as little as one day. *See, e.g., Kuenzel v. State*, No. CV-93-351 (one day); *Maxwell v. State*, No. CC-97-342.60 (five days); *Broadnax v. State* (six days); *Ferguson v. State*, No. CC-97-343.61 (eight days); *Borden v. State*, No. CC-93-228.60 (eleven days); *Flowers v. State*, No. CC-97-20.60-EWR (two weeks).

Although drafted by State prosecutors, these proposed orders frequently invoke the trial court's unique experience or "events within the [court's] personal knowledge." *Flowers v. State*, No. CC-97-20.60-EWR, at 1. In one case, the proposed and final orders invoke the trial judge's personal experience as a practicing attorney as a basis for rejecting the testimony of the defendant's expert witness: "Prior to service on the bench, this Court also had been a practicing attorney for a number of years in Alabama. Whereas Mr. Conner [the defendant's expert] has not been involved in the trial of any case, including capital cases, in Alabama, this Court has, both as an attorney and on the bench." *Barksdale v. State*, No. CC-96-03, at 9.[7]

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[7] *See also, e.g., Maxwell v. State*, No. CC-97-342.60, at 19 (rejecting contention about the content of the prosecutor's closing statement on the ground that the judge "has reviewed the entire record at trial, including all closing arguments of counsel")

In other cases, the verbatim-adopted orders contain personal attacks against defense counsel. In *Grayson*, for instance, the trial court adopted verbatim the prosecutor's assertion that the petitioner "wastes this Court's time" with a claim that is "frivolous" and "misleading"—and also adopted verbatim the prosecutor's warning that "[c]ounsel for petitioner is admonished to refrain from such conduct when appearing before this Court in the future." *Grayson v. State*, No. CC-94-3700.60, at 141–42 (proposed and final orders).[8]

Moreover, it sometimes unclear whether the trial court has reviewed the proposed orders at all. The trial courts' orders sometimes contain dozens of typographical errors identical to those found in the proposed orders submitted by the State. *See, e.g.*, *Dunaway v. State*, Nos. CC-97-75.60, CC-97-76.60

(proposed and final orders); *Melson v. State*, No. CC-1994-925.60, at 11, 43 (dismissing ineffective assistance of counsel claim "[b]ased on the court's observation of trial counsel"—and acknowledging that "[t]his judgment was submitted to this Court by the State of Alabama as a proposed Order");

[8] The State in *Grayson* appears to have recognized that the trial court might not meaningfully review the proposed order, specifically alerting the trial court to delete portions of the order that it did not agree with: "Finally, the State calls this Court's attention to the language on pages 141–42 of the proposed order dismissing Claim VI(A). The admonishment directed towards opposing counsel is appropriate only if this Court takes the same offense at this type of incomplete, misleading pleading as taken by the State. If not, this language should be struck from the proposed order." Letter from James R. Houts, Asst. Att'y Gen., to Michael W. McCormick, Circuit Judge (Feb. 5, 2004).

(proposed and final orders). In several cases, the trial court's final order is called a "Proposed" order. *Hamm v. State*, No. CC-87-121.60 (proposed and final orders); *Borden v. State*, No. CC-93-228.60 (proposed and final orders); *Maxwell v. State*, No. CC 97-342.60 (proposed and final orders). In *Grayson*, the court adopted verbatim an order that included an erroneous reference to a different petitioner in a case from a different county. *Grayson v. State*, No. CC-94-3700.60, at 10 (proposed and final orders). And in *Dunaway*, the trial judge signed a proposed order over a misspelling of his own name. *Dunaway v. State*, Nos. CC-97-75.60, CC-97-76.60, at 110 (proposed and final orders).

B. Efforts by state prosecutors to create the appearance of more searching review by the Alabama postconviction courts have elevated form over substance. In *Hallford v. State*, 629 So. 2d 6 (Ala. Crim. App. 1992), the trial court adopted the State's proposed order but included in its opinion the following statement: "The adoption of this order is based on the Court's own evaluation of the evidence and law in the case." *Id.* at 8 (quotations and emphasis omitted). The Court of Criminal Appeals distinguished *Hallford* from "a situation . . . where the trial court merely adopted verbatim the proposed order of the State." *Id.*[9]

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[9] *See also, e.g., Cade v. State*, 629 So. 2d 38, 40 (Ala. Crim. App. 1993) ("In his order, the trial judge stated that he had independently evaluated each of the appellant's allegations; and that he had specifically addressed the ineffective assistance of counsel claim in the order.").

The State has responded to these decisions by suggesting, in its cover letter, that the Rule 32 court add a boilerplate statement that "the Court adopted the proposed order only after considering all of the evidence" and "the arguments of both parties." In *Borden v. State*, No. CC-93-228.60, for instance, the State advised the Rule 32 judge: "Should the Court adopt the State's proposed order dismissing the Rule 32 petition in substantially the same form as it was submitted, the State respectfully requests that the Court add a paragraph at the conclusion of the order that establishes that the Court adopted the proposed order only after reviewing the record, the supporting affidavits [sic] and finding that the State's proposed order correctly represents the findings and conclusions of the Court." Letter from David Clark, Asst. Att'y Gen., to Hon. Philip Reich (Jan. 17, 2002). The addition of this boilerplate disclaimer is often the only change that the Rule 32 court makes to the State's proposed order.

In some cases the State goes to even greater lengths to create the appearance of independent review. In *Grayson*, the State specifically advised the trial court "to strike the word 'proposed' from the title before adopting the State's proposed order." "Such a change," suggested the State, "will allow any reviewing courts to determine that this Court reviewed this order and had an opportunity to make any changes deemed necessary by the Court." Letter from James R. Houts, Asst. Att'y Gen., to Judge Michael W. McCormick (Feb. 5, 2004).

Boilerplate language, however, cannot change the actual circumstances underlying the adoption of

these orders: a judge adopts a lengthy order verbatim, within days of its submission, and without addressing the defendant's written arguments. In these circumstances, a reviewing court must "stretch nearly to the breaking point the presumption that the findings entered by the court were in fact the court's own findings." *Phillips v. Phillips*, 464 P.2d 876, 878 (Colo. 1970).

II. The Eleventh Circuit Erred in Accepting as Reasonable Erroneous Factual Determinations In The Trial Court's Orders That Were Adopted Verbatim From The Proposed Orders Drafted by State Prosecutors.

The state-court orders to which the Eleventh Circuit deferred were drafted almost entirely by the State, and these orders appear to have received little consideration by the state courts themselves. The orders adopted verbatim erroneous factual assertions in the State's proposed orders relating to trial counsel's failure to investigate a mental capacity defense at sentencing. In evaluating, under 28 U.S.C. § 2254(d), whether the state court's determination of the facts and application of the law was unreasonable, the Eleventh Circuit should have considered not only the substance of the state court's findings, but also the process by which they were made. Under the appropriate level of scrutiny, the state-court orders cannot stand.

A. On November 30, 1999, Wood filed a timely petition, under Alabama Rule of Criminal Procedure 32, challenging his conviction and death sentence.

Among other things, Wood argued that trial counsel rendered ineffective assistance during sentencing because counsel failed to investigate and present evidence of his impaired mental functioning. *See* J.A. 212–54.

The Rule 32 court rejected Wood's ineffective-assistance claim in orders drafted by the State prosecutor. The orders' key findings on that claim were adopted nearly verbatim from the State's proposed orders. The Alabama Court of Criminal Appeals ultimately adopted those findings in full.

1. *The First Order.* After an evidentiary hearing, the State submitted a 73-page proposed order. *See* Pet'r Objection to This Court's Adoption of the State's Proposed Final Order (Dec. 13, 2001) ¶ 3. Wood subsequently filed a 157-page brief. Br. in Support of the Claims Raised in Pet'r Second Amended Petition (Nov. 16, 2001).

The state's proposed order was accompanied by a diskette and accompanying letter. In that letter, the State advised: "There are several places in the proposed order where the State asks the Court to make findings based on personal knowledge or experience. Obviously the State of Alabama can only guess as to what personal knowledge or experience the Court has to draw from." Letter from James R. Houts, Asst. Att'y Gen., to Hon. Thomas E. Head, III (Nov. 14, 2001).

At the time the State submitted its proposed order, the trial court had not yet made even an oral ruling, Wood had not yet submitted a brief, and the

trial judge had provided no insight into the extent of his "personal knowledge." Yet the State's letter recognized the likelihood that the trial court would adopt the State's proposed order verbatim, and sought to create the appearance that the trial court had conducted independent review. The State's letter suggested: "[I]f the Court should adopt the State's final order in substantially the same form as it is submitted, the State of Alabama respectfully requests that the Court add a section in the order that notes that the Court adopted the proposed order only after considering all of the evidence, the arguments of both parties, and finding that the State's proposed order correctly represents the findings and conclusions of the Court." *Id.*

On November 27, 2001, the trial court adopted the State's proposed order—verbatim—less than two weeks after receiving the parties' submissions. Pet. App. 154a–226a; *see also* Pet'r Objection to This Court's Adoption of the State's Proposed Final Order (Dec. 13, 2001) (objecting on the ground that "[t]his Court's order was identical to the State's proposed order"). The judge did not elaborate on the basis for the "personal knowledge" or "experience" that the State invoked. And neither the proposed order nor the identical final order addressed any of the specific arguments raised in Wood's 157-page brief.

The final order did add, however, the boilerplate language proposed by the State in its cover letter to create the appearance of independent review. *See* Pet. App. 226a ("The Court adopts the State's proposed final order as submitted only after having considered the pleadings, all of the evidence, the

arguments of both parties, and finding that same correctly represents the findings and conclusions of the Court.").

The trial court's order, adopted verbatim from the State's submission, contained significant erroneous factual assertions. For instance, the trial court erroneously stated that "the record also shows that trial counsel investigated a potential mental health defense, but decided against presenting it." Pet. App. 201a. Yet the evidence presented during the hearing established that beyond an initial evaluation of Wood's competency to stand trial—which found that Wood was "functioning, at most, in the borderline range of intellectual functioning," J.A. 328—trial counsel did not investigate Wood's mental impairment or his mental capacity more generally.[10] To the contrary, Wood's trial counsel informed the trial court on the morning of the sentencing hearing that beyond the competency report, "[n]o further investigation ha[d] been done" and that Wood's mental impairments "need[ed] further assessment." J.A. 12.

2. *The Second Order.* On April 25, 2003, the Alabama Court of Criminal Appeals vacated the first order and remanded for additional testimony. J.A.

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[10] *See* J.A. 284–85 (trial counsel did not request further psychological evaluation from competency expert); Tr. 121, Aug. 22, 2001 (Wood's sister did not meet with trial counsel until immediately before sentencing hearing); Tr. 171-72, Sept. 18, 2000 (Wood's other sister not contacted by trial counsel until the date that Wood was convicted, and was not asked to testify on his behalf at sentencing); J.A. 267-68 (trial counsel did not speak with Wood's teachers and failed to obtain his academic records).

369–90. After the hearing on remand, both the State and Wood submitted proposed orders to the trial court. *See* State's Proposed Final Order (Sept. 12, 2003); Pet'r Proposed Final Order (Sept. 15, 2003). Less than two weeks later, the trial court issued a final order. *See* Pet. App. 227a–275a. Although the trial court deleted twenty pages of background information from the State's proposed order, the State's proposed factual findings and legal conclusions were adopted nearly verbatim. *See id.*

In adopting the State's proposed order, the trial court again made erroneous statements—drafted by the State—about trial counsel's investigation of a mental capacity defense. Adopting the State's proposed language verbatim, the court stated: "Based on their investigation and the detailed information they had in their possession, Wood's counsel made a reasonable judgment that another mental evaluation was not necessary." Pet. App. 271a. Not only did the testimony from the first evidentiary hearing refute this assertion (as discussed above), but the second hearing featured two additional witnesses who *confirmed* that Wood's trial counsel had not conducted the investigation necessary to make such a judgment. *See* J.A. 405-06 (Wood's special education teacher never contacted by Wood's trial counsel); J.A. 416-17 (another of Wood's special education teachers never contacted by Wood's trial counsel).

3. *The Decision of the Court of Criminal Appeals.* The findings, drafted by the State and adopted nearly-verbatim by the trial court, were then adopted in turn by the Alabama Court of Criminal Appeals. The Court of Criminal Appeals stated that

the trial court "made extensive findings concerning the appellant's contentions that he is mentally retarded and that his attorneys rendered ineffective assistance by not developing and presenting evidence that he is mentally retarded." J.A. 593. Without any further analysis or discussion, the Court of Criminal Appeals stated that "[t]he record supports those findings, and we adopt them as part of this opinion." J.A. 593–94; *see also* J.A. 605 ("We agree with the circuit court's findings, conclude that they are supported by the record, and adopt them as part of this opinion."); J.A. 607 ("As set forth above, the [trial] court found that the appellant's attorneys rendered effective assistance at trial and on direct appeal."). The Court of Criminal appeals also rejected Wood's argument that the trial court "improperly adopted verbatim the State's proposed order." J.A. 608–09.

Judge Cobb, concurring in the result, observed that the majority had adopted the trial court's findings without any independent discussion and analysis: "[I]n a case involving review of post-conviction proceedings in a capital murder case in which the death penalty was imposed, discussion and analysis of the trial court's findings of fact and conclusions of law are necessary." J.A. 610. Judge Cobb faulted the majority for affirming "[w]ithout any specific discussion or analysis of the findings in the trial court's order" and "without quotation to any of the relevant portions it says the Court adopts." *Id.*

B. The State prosecutors' factual findings and legal conclusions as to Wood's ineffective-assistance claim thus came to the Eleventh Circuit virtually unmodified by any Alabama court. The Eleventh Cir-

cuit nonetheless ignored the "potential for overreaching and exaggeration on the part of attorneys preparing findings of fact," *Anderson*, 470 U.S. at 572, and "[t]he natural tendency of counsel given an opportunity free of adversary constraints to shore up weak points, to gloss over evidence or credibility problems at odds with necessary findings, and to argue inferences in the guise of 'findings,'" *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 369 (4th Cir. 1983). Instead, the Eleventh Circuit deferred to the State-drafted findings, including the erroneous assertion that "counsel investigated a potential mental health defense, but decided against presenting it." Pet. App. 41a (quoting first Rule 32 order).

As this Court has previously observed, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340–41 (2003). Especially given the manner in which the state court orders were prepared, they deserved greater scrutiny than the Eleventh Circuit gave them. This Court has observed that a trial court's failure to craft its own findings of fact "add[s] considerably" to the task of reviewing of the record. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 616 n. 13 (1974). Federal and state appellate courts have similarly recognized that when a trial judge "abdicate[s] to a party his duty to provide a reasoned explanation for his decision and merely copies submitted proposals," the court should "check the adopted findings against the record with particular, even painstaking care." *Berger v. Iron Workers Reinforced Rodmen Local 201*,

843 F.2d 1395, 1404, 1408 (D.C. Cir. 1988) (internal citation and quotation marks omitted).[11]

Meaningful review of party-drafted findings is required even under the deferential standards of AEDPA. Section 2254(d) requires reviewing courts to assess whether the state court's decision "involved an unreasonable application of[] clearly established Fed-

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[11] *See also, e.g., Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 n. 3 (9th Cir. 1984) ("special scrutiny"); *Cuthbertson*, 702 F.2d at 459 (4th Cir. 1983) ("less weight and dignity" (internal citation and quotation marks omitted)); *EEOC v. Fed. Reserve Bank*, 698 F.2d 633, 639-42 (4th Cir. 1983) ("careful scrutiny"), *rev'd on other grounds sub nom. Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984); *Domino's Pizza*, 615 F.2d at 258 (district court's "lack of personal attention to the factual findings" will be taken "into account"); *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978) ("more careful scrutiny"); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 314 n.1 (5th Cir. 1977) ("more confident in concluding that important evidence has been overlooked or inadequately considered when factual findings were not the product of personal analysis and determination by the trial judge"); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977) ("critical view"); *Las Colinas*, 426 F.2d at 1010 ("most searching examination for error"); *Louis Dreyfus*, 298 F.2d at 739 ("doubt is cast"); *In re Sabrina M.*, 460 A.2d 1009, 1013 (Me. 1983) (when a trial court adopts proposed findings verbatim, the Supreme Court of Maine will "closely scrutinize such findings to determine whether the trial court has adequately performed its judicial function"); *Cormier v. Carty*, 408 N.E.2d 860, 863 (Mass. 1980) ("findings which fail to evidence a 'badge of personal analysis' by the trial judge must be subjected to stricter scrutiny" and courts "will be more likely in a close case to disregard a finding, or remand for further findings where the judge has neither personally prepared the findings, nor 'so reworded a submission by counsel that it is clear that the findings are the product of his independent judgment'" (citations omitted)).

eral law" and whether the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Both in the context of AEDPA and in other types of criminal proceedings, a determination of "reasonableness" depends not only on the substance of the underlying ruling or finding, but also on the adequacy of the process that produced it. *See, e.g., Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597 (2007) (review of sentence for reasonableness includes determination that sentencing decision was "procedurally sound"); *Drake v. Portuondo*, 321 F.3d 338, 345 (2d Cir. 2003) (because the petitioner's motion was "summarily denied" without a hearing, Section 2254(e)(1)'s presumption of correctness did not apply).[12]

The findings of the Alabama courts in this case were the work not of the courts themselves but of the prosecutors, whose proposed orders squarely contradicted the record yet were adopted virtually automatically. Given the factual errors in the state court

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[12] *See also, e.g., Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (habeas petitioner may challenge a conviction under Section 2254(d)(2) on the grounds that "the process employed by the state court is defective"); *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) (if there was no "full, fair, and adequate hearing in the state court," the presumption of correctness does not apply); *see also Valdez v. Cockrell*, 274 F.3d 941, 968 (5th Cir. 2001) (Dennis, J., dissenting) (Because "the state habeas judge did not read the trial transcript, thus depriving [petitioner] of a full and fair hearing," the state court did not "render[] a decision that was based on a reasonable 'determination of the facts in light of the evidence presented.'") (citations omitted).

orders and the circumstances under which those orders were drafted and adopted, this Court should hold that the state court's determination—that trial counsel investigated a mental capacity defense at sentencing and made a reasonable judgment not to pursue it further—was unreasonable.

Conclusion

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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